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HOUSING LAW—UNITED STATES v. COLUMBUS COUNTRY CLUB: HOW “RELIGIOUS” DOES AN ORGANIZATION HAVE TO BE TO QUALIFY FOR THE FAIR HOUSING ACT’S RELIGIOUS ORGANIZATION EXEMPTION?

Claudia J. Reed

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NOTES

HOUSING LAW—*United States v. Columbus Country Club*: HOW “RELIGIOUS” DOES AN ORGANIZATION HAVE TO BE TO QUALIFY FOR THE FAIR HOUSING ACT’S RELIGIOUS ORGANIZATION EXEMPTION?

INTRODUCTION

In 1968, Congress passed the Fair Housing Act (the “Act”) as part of the Civil Rights Act of 1968.¹ The Act’s purpose was to “assure every American a full opportunity to obtain housing for himself and his family free from any discrimination on account of race, color, religion, or national origin.”² The Act prohibits discrimination by owners of rental housing, lenders, real estate brokers, and others engaged in the sale of housing.³ However, section 3607 of the Act⁴ provides a limited exemption from these prohibitions to a “religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society.”⁵ An entity conforming to the above description may limit “the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion.”⁶ The exemption’s purpose is not explicitly stated in its language or legislative his-

1. Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-19 (1988)).

2. H.R. Res. 16340, 90th Cong., 2d Sess., 114 CONG. REC. 8,407 (1968). For an in-depth discussion of the problems created by housing discrimination, see Elliot M. Mincberg, Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128, 129-33 (1976) (discussing problems resulting from racial segregation caused by housing discrimination) and Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874 (1988) (discussing the reasons that fair housing laws have largely failed to improve racial segregation and suggesting alternative strategies).

3. 42 U.S.C. §§ 3604-06 (1988).

4. Civil Rights Act of 1968, § 807, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. § 3607 (1988)).

5. 42 U.S.C. § 3607 (1988).

6. *Id.*

tory. However, Congress undoubtedly wished to protect religious organizations from governmental interference with their decisions regarding allocation of housing to members of their own religion, in accordance with the Free Exercise and Establishment Clauses of the First Amendment.⁷

While the exemption's application to religious organizations themselves is fairly straightforward, its interpretation in cases involving organizations that are operated, supervised or controlled by or in conjunction with religious organizations, associations or societies is more difficult. The Court of Appeals for the Third Circuit recently decided *United States v. Columbus Country Club*,⁸ the first case to explicitly confront the exemption. This case presents the issue of how the exemption should be interpreted in clear terms.⁹ In *Columbus Country Club*, a private, nonprofit country club clearly discriminated in housing based on religion. It leased summer bungalow lots only to "annual members," and restricted "annual membership" to Catho-

7. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

The Fair Housing Act itself explicitly recognizes constitutional limitations upon its provisions. Section 801 of the Act (codified at 42 U.S.C. § 3601) provides that "[i]t is the policy of the United States to provide, *within constitutional limitations*, for fair housing throughout the United States." 42 U.S.C. § 3601 (1988) (original version at Pub. L. No. 90-284, 82 Stat. 81 (1968)) (emphasis added).

A similar religious organization exemption is contained in the federal statute that prohibits discrimination in employment, 42 U.S.C. § 2000e (1988) (original version at Title VII, Civil Rights Act of 1964, § 702, Pub. L. No. 88-352, 78 Stat. 255). The purpose of the Title VII religious organization exemption was to protect those organizations' free exercise rights by preventing undue governmental interference in their employment decisions. See Duane E. Okamoto, Note, *Religious Discrimination and the Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1417 (1987).

8. 915 F.2d 877 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991).

9. *Id.* The *Columbus Country Club* majority contended that the exemption was previously interpreted in *United States v. Hughes Memorial Home*, 396 F. Supp. 544 (W.D. Va. 1975). *Columbus Country Club*, 915 F.2d at 883. The *Columbus Country Club* dissent disagreed, and stated that the *Hughes* court did not really interpret the exemption. *Id.* at 886 n.1 (Mansmann, J., dissenting).

Hughes involved a suit against a home for needy children by the Attorney General. The complaint alleged that the home discriminated against black children in violation of the Fair Housing Act. *Hughes*, 915 F.2d at 546-47. The defendant argued that the Act did not apply. The *Hughes* court determined that the religious organization exemption was not at issue in that case because the defendant was a non-sectarian institution open to children of all creeds, and the religious exemption was therefore "inapplicable by its terms." *Id.* at 550. This is arguably not an interpretation of the exemption. The *Hughes* court did not address any issue regarding the exemption other than whether it could apply to a non-sectarian organization.

lics.¹⁰ This admitted religious discrimination would violate the Fair Housing Act, unless the Columbus Country Club (the "Club") was "controlled by" or "operated in conjunction with" the Catholic Church (the "Church") so as to fit within the Act's exemption.¹¹ The Church had granted permission for mass to be heard on the grounds of the Club, arranged for a local priest to celebrate the mass, and tacitly approved recital of the rosary on Club grounds, but had no additional connections with the Club.¹²

The majority and dissent held conflicting views regarding the interpretation of the exemption as it applied to the Club. The majority ruled that the exemption should be construed narrowly, and held that, because there was no formal relationship between the Club and the Church, the exemption did not apply.¹³ The dissent urged a broader reading of the exemption, and stated that a fuller examination of both the Club's purposes and its connection with the Church would show that the Club did fit within the exemption.¹⁴

Neither the majority nor the dissenting opinion examined the constitutional implications of their conclusions.¹⁵ Moreover, they failed to examine the interpretation of religious organization exemptions in any other statute to lend support to their conclusions. Case law exists that deals with the interpretation of the religious organization exemption contained in Title VII, the employment discrimination provision of the Civil Rights Act of 1964¹⁶ ("Title VII"). Furthermore, some state housing acts have religious organization exemptions.¹⁷ The Title VII and state housing act exemptions are similar in many ways to the Fair Housing Act's exemption. The *Columbus Country Club* court could have looked to case law interpreting these exemptions for guidance. This Note discusses why and how the court could have used constitutional principles, Title VII case law, and state

10. As alleged in the complaint filed in federal district court by the United States Department of Justice, the Columbus Country Club (the "Club") may also have discriminated based on sex and on a person's protest against the Club's allegedly unlawful practices. See *infra* notes 80-90 and accompanying text.

11. *Columbus Country Club*, 915 F.2d at 883.

12. *Id.* at 879.

13. *Id.* at 883.

14. *Id.* at 885-88 (Mansmann, J., dissenting).

15. The majority stated that it would not address these arguments because the district court had not done so. *Id.* at 885. On remand, the district court did address these constitutional issues. See *infra* notes 226-42 and accompanying text.

16. Civil Rights Act of 1964, § 702, Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e (1988)). See *infra* note 147 and accompanying text.

17. See *infra* note 180 and accompanying text.

case law to aid in its interpretation of the religious organization exemption contained in the Fair Housing Act.

Part I of this Note discusses relevant constitutional considerations¹⁸ and the legislative history of the Fair Housing Act. Part II examines *United States v. Columbus Country Club*¹⁹ and focuses on the reasoning of both the majority and the dissent with regard to the interpretation of the Act's religious organization exemption. Part III addresses case law that sets out standards governing the application of Title VII's religious organization exemption and a similar state fair housing act.²⁰ All of the cases discussed in Part III set forth various standards to determine the extent of an entity's affiliation or connection with a religious organization.²¹ Part IV considers whether any one, or a combination, of the Title VII standards and state housing law standards would apply equally well to interpret the Fair Housing Act's religious organization exemption. Part IV also examines whether the First Amendment's Establishment and/or Free Exercise Clauses²² require an outcome different from that reached in the principal case.

The Note concludes by arguing that the decision reached in *Columbus Country Club* was correct, but the factors underlying the application of the Title VII exemption and the state fair housing law exemption would have provided a better basis for that decision. These factors should be considered in future applications of the Act's religious organization exemption.

I. BACKGROUND

A. Relevant Constitutional Principles

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof."²³ The First Amend-

18. The Club, in its Petition for Rehearing En Banc and Petition for Writ of Certiorari to the United States Supreme Court, alleged that the majority's decision violated the Establishment and Free Exercise Clauses contained in the First Amendment to the Constitution. Both of these petitions were denied. *Columbus Country Club*, 915 F.2d 877, 888 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991). See *infra* notes 229-42 and accompanying text for the district court's treatment of these issues on remand.

19. 915 F.2d 877 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991).

20. See *infra* note 180 for the text of New York's fair housing law's religious organization exemption.

21. See *infra* notes 154-85 and accompanying text.

22. U.S. CONST. amend. I.

23. *Id.*

ment's "religion clauses,"²⁴ as the foregoing language is called, are necessary to preserve religious organizations' and individuals' rights to be free from governmental interference with their religious practices and beliefs.²⁵ Thus, the Constitution requires statutes such as the Fair Housing Act to contain some sort of exemption for religious organizations. Otherwise, religious institutions would not be free to limit their membership or assistance to persons of their own religion.

The Establishment Clause only requires that the government not enact a law "respecting an establishment of religion."²⁶ Courts have interpreted this phrase to mean that, at the very least, the government may not "coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"²⁷ Furthermore, the government may not "obtrude itself in the internal affairs of any religious institution."²⁸ However, Congress does exactly the opposite of intruding into religious organizations' affairs when it exempts those organizations from the provisions of certain statutes. These exemptions "alleviat[e] significant governmental interference with the ability of religious organizations to define and carry out their religious missions."²⁹ Thus, in certain areas, religious institutions are free to discriminate on religious grounds.³⁰ However, groups which are not religious may not do so. The Supreme Court has stated that "freedom of religion, like freedom from race discrimination and freedom of speech [is] a 'constitutional norm.'"³¹ While the Constitution does not prohibit private discrimination, Congress has done so in various federal laws.³²

The Establishment Clause limits the government's ability to interfere with peoples' religious beliefs and practices. The Free Exercise Clause accomplishes a similar goal.³³ However, under the Free Exer-

24. *Lee v. Weisman*, 112 S. Ct. 2649, 2652, 2656 (1992).

25. "[T]he central meaning of the Religion Clauses of the First Amendment . . . is that all creeds must be tolerated and none favored." *Id.* at 2657.

26. U.S. CONST. amend. I.

27. *Lee*, 112 S. Ct. at 2655 (citing *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

28. *Id.* at 2661-62 (Blackmun, J., concurring).

29. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987).

30. *See infra* notes 57, 147.

31. *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring).

32. *Norwood v. Harrison*, 413 U.S. 455, 470 (1973).

33. The two clauses must be read together. The government may accommodate the free expression of religious beliefs, but this principle cannot take precedence over the limitations of the Establishment Clause, which provides that the government may not promote

cise Clause, individuals' or groups' religious beliefs do not always excuse them from complying with "an otherwise valid law prohibiting conduct that the State is free to regulate."³⁴ As long as a statute prohibiting certain conduct is "generally applicable and otherwise valid,"³⁵ is not "specifically directed to religious practice,"³⁶ and is "otherwise constitutional as applied to those who engage in the specific act for nonreligious reasons,"³⁷ persons or groups will be excused from compliance on free exercise grounds only if they meet the test set out in *Sherbert v. Verner*.³⁸ That test requires that parties seeking exemption from such a statute show that the infringement of their free exercise right is substantial and that the government has no compelling interest in regulating the conduct at issue.³⁹

Furthermore, the Supreme Court has held that the *Sherbert* test, which balances the nature of the infringement upon the individual's free exercise rights against the nature of the government's interest, should not be employed in every case involving a free exercise challenge.⁴⁰ For example, the Court has declined to use this test in cases involving a free exercise challenge to an "across-the-board criminal prohibition on a particular form of conduct."⁴¹

In order to evaluate the viability of an Establishment Clause or Free Exercise Clause challenge to the *Columbus Country Club*⁴² ma-

religion. *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992). See also Jonathan E. Nuechterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127 (1990). See *infra* notes 223-68 and accompanying text.

34. *Smith*, 494 U.S. at 878-79 (holding denial of unemployment benefits to persons who were fired from their jobs at a drug rehabilitation clinic after having ingested peyote as part of a ceremony at a Native American Church, of which both were members, did not violate employees' free exercise rights).

35. *Id.* at 878.

36. *Id.* at 872.

37. *Id.*

38. 374 U.S. 398 (1963).

39. *Sherbert*, 374 U.S. at 406-07. See also *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18-19 (1989); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *United States v. Lee*, 455 U.S. 252 (1982).

40. *Smith*, 494 U.S. at 883-85. The Court in *Smith* noted that the *Sherbert* test had only been used in cases where a claimant protested that denial of unemployment compensation infringed upon his free exercise rights. While the *Smith* Court did not foreclose the use of the *Sherbert* balancing test in any other situation, it stated that even if it were to use the test outside of an unemployment compensation context, it would still be inapplicable to a free exercise challenge to an "across-the-board criminal prohibition on a particular form of conduct." *Id.* at 884-85 (emphasis added).

41. *Id.* For a discussion of other instances in which a court should not engage in a *Sherbert* balancing test, see *infra* note 266 and accompanying text.

42. *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991).

jority's interpretation of the Fair Housing Act's religious organization exemption, it is necessary to understand the Act itself and its effect on a group such as the Columbus Country Club.

B. *The Fair Housing Act*

The Fair Housing Act was a continuation of several years of congressional effort to improve the status of minorities, particularly African-Americans.⁴³ In 1963, members of Congress, as well as President Kennedy, submitted numerous bills in an attempt to end various types of discrimination on a national scale.⁴⁴ When the Civil Rights Act of 1964 was passed, it prohibited discrimination in several areas on the basis of race, color, religion, and national origin, but it did not contain any provisions relating to discrimination in housing.⁴⁵

The first congressional attempt to eliminate discrimination in the sale or rental of housing occurred in 1966.⁴⁶ The suggested housing discrimination statute was part of the proposed Civil Rights Act of 1966.⁴⁷

The religious organization and private club exemptions had originally been proposed by the House Judiciary Committee.⁴⁸ By August 3, 1966, the initial form of the religious organization and private club

43. H.R. REP. NO. 914, 88th Cong., 2d Sess. 2, *reprinted in* 1964 U.S.C.C.A.N. 2355, 2391-93. The House Report indicated Congress' desire to ameliorate the discriminatory situations with which most minorities were faced.

Considerable progress has been made in eliminating discrimination in many areas because of local initiative either in the form of State laws and local ordinances or as the result of voluntary action. Nevertheless, in the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious. That need is evidenced, on the one hand, by a growing impatience by the victims of discrimination with its continuance and, on the other hand, by a growing recognition on the part of all of our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated.

Id. at 2393.

44. *Id.* at 2391-92.

45. The Civil Rights Act of 1964 prohibited discrimination on the basis of race, color, religion and national origin in the following areas: voting rights, places of public accommodation, public education, federally assisted programs, and employment. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243-47, 252-54, 266-68 (codified as amended at 42 U.S.C. § 2000a-h (1988)).

46. H.R. 14765, 89th Cong., 2d. Sess., 112 CONG. REC. 18,112 (1966).

47. The proposed Civil Rights Act of 1966 was never enacted. *See infra* text accompanying note 54.

48. In 1966, the House Judiciary Committee spent nine executive sessions devoted primarily to revising Title IV (the fair housing section of the proposed Civil Rights Act of 1966). Changes were, for the most part, in areas of coverage and enforcement. Most of the changes were apparently intended to limit the scope of Title IV. 112 CONG. REC. 22,131

exemption language already existed.⁴⁹ In the 1966 version, private or fraternal organizations were mentioned in the same sentence with, and treated in the same manner as, religious institutions. The proposed 1966 language exempted a religious, private, or fraternal organization that made discriminatory selections based on religion in an effort to promote the organization's "religious principles or the aims, purposes, or fraternal principles for which it is established or maintained."⁵⁰

The proposed Civil Rights Act of 1966, as a whole, caused considerable debate. The controversy centered primarily around the fair housing provision and the section that prescribed penalties for certain racially motivated acts of violence.⁵¹ The proposed fair housing section was known to its foes as the "open housing"⁵² provision of the Act. Opponents contended that this provision was an attempt to eliminate the free alienability of property and was therefore unconstitutional.⁵³ The 1966 attempt to enact a fair housing statute, as well as attempts in 1967, failed.⁵⁴ In fact, the Fair Housing Act was not passed by both houses of Congress until April, 1968, four days after

(1966) (remarks of Senator Thurmond). One such change was the forerunner of the present religious organization exemption.

The Legislative Reference Service discussed the exemptions in pertinent part as follows:

Section 403 of the Committee bill carves out two other new exemptions The second exemption permits any religious or denominational institution, or any charitable or educational institution or organization which is operated, supervised, or controlled by or in conjunction with a religious organization, or any bona fide private or fraternal organization, to give preference to persons of the same religion or denomination, or to members of such private or fraternal organization, or to make such selection as is calculated to promote the religious principles or the aims, purposes for which it is established or maintained. Similar exemptions are found in many state open occupancy laws and presumably this experience may be relied upon in borderline cases.

LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, ANALYSIS OF CHANGES MADE IN TITLE IV BY HOUSE JUDICIARY COMMITTEE, 112 CONG. REC. 22,133 (1966).

49. See *infra* note 57 for the text of the 1966 proposed exemption.

50. 112 CONG. REC. 18,112 (1966) (emphasis added) (Reading of Title IV, Civil Rights Act of 1966, H.R. 14765). See *infra* note 57 for the full text of the proposed 1966 exemption.

51. 112 CONG. REC. 17,111, 17,179, 17,479, 17,580, 17,751, 17,831, 18,104, 18,171, 18,394, 18,455, 18,700 (1966); 114 CONG. REC. 9,528-620 (1966).

52. 114 CONG. REC. 9,528 (1966).

53. One opponent remarked, "If this bill were to be passed, the Constitutional right . . . of an individual to purchase, own, dispose of and enjoy property as he sees fit would be denied." 112 CONG. REC. 22,130 (1966) (remarks of Sen. Thurmond).

54. 112 CONG. REC. 22,719, 22,792, 23,019, 23,043 (1966). Fair housing provisions were debated in the House of Representatives but not voted upon in 1967. 113 CONG. REC. 17,975 (reporting the bill out on June 29, 1967). The House also debated the fair housing legislation in the context of a debate concerning project sites for the Atomic Energy Commission. 113 CONG. REC. 19,715 (1967).

the assassination of Martin Luther King, Jr.⁵⁵

As enacted, the “aims, purposes or fraternal principles” language of the 1966 version was omitted, and the exemption was divided into two parts: first, it addressed religious organizations or entities controlled by or operated in conjunction with them; and second, it addressed private clubs. The 1968 version treated these two types of organizations differently. A private club could limit the rental or occupancy of its *lodgings*. A religious organization, or an organization operated, supervised, or controlled by or in conjunction with a religious organization, could limit the *sale*, rental, or occupancy of its *dwellings*.⁵⁶

The Fair Housing Act, as finally enacted, bears a great deal of resemblance to the fair housing sections that were originally part of the proposed Civil Rights Act of 1966.⁵⁷ Therefore, although the leg-

55. The Fair Housing Act was passed by the Senate on March 11, 1968 as part of the Civil Rights Act of 1968. 114 CONG. REC. 5,992 (1968). It was passed by the House of Representatives on April 10, 1968. 114 CONG. REC. 9,621 (1968). See, e.g., ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW & LITIGATION* § 5.2 (1990).

56. 42 U.S.C. § 3607 (1988). See *infra* note 57 for the full text of the exemption as enacted. The Fair Housing Act was amended in 1988. 42 U.S.C. §§ 3601-19, Pub. L. No. 100-430, 102 Stat. 1619 (1988). Those amendments are not significant for purposes of this Note. The portions amended were §§ 3602, 3604-08, 3615-19, and 3631. Although § 3607, the religious organization and private club exemption, was amended, none of the language pertaining to religious organizations or private clubs was changed. The amendment consisted solely of the addition of language regarding maximum occupancy and housing for the elderly.

On February 6, 1968, prior to the final passage into law of the Fair Housing Act, a series of questions and answers was read into the record after the Senate's approval of the latest amendments to the Act. In response to a question regarding what exemptions were now contained in the Act, Senator Mondale's response was, “There is an exemption to permit religious institutions or schools, etc., affiliated with them, to give preference in housing to persons of their own religion despite the Act.” 114 CONG. REC. 2,273 (1968); *United States v. Columbus Country Club*, 915 F.2d 877, 882 (3d Cir. 1990).

57. “H.R. 2516 as reported closely resembles Title IV of the proposed Civil Rights Act of 1966.” S. REP. No. 721, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S.C.C.A.N. 1838.

In 1966, the proposed exemption was as follows:

(c) Nothing in this section shall bar any religious or denominational institution, or any charitable or educational institution or organization which is operated, supervised or controlled by or in conjunction with a religious organization, or any bona fide private or fraternal organization, from giving preference to persons of the same religion or denomination, or to members of such private or fraternal organization, or from making such selection as is calculated by such organization to promote the religious principles or the aims, purposes, or fraternal principles for which it is established or maintained.

112 CONG. REC. 18,112 (1966) (Reading of Title IV, Civil Rights Act of 1966, H.R. 14765).

Section 807, the religious organization/private club exemption, as enacted, provided as follows:

islative history of the Fair Housing Act has been referred to as "limited"⁵⁸ or "sketchy,"⁵⁹ the foregoing examination of the proposed 1966 Act's housing provisions is fruitful because those sections were incorporated, with some changes, into the 1968 version of the Fair Housing Act.⁶⁰

Although the religious organization exemption enacted in 1968 is somewhat different from the 1966 version, the language crucial to the *Columbus Country Club* decision was present in both the proposed 1966 Act and the 1968 Act.⁶¹ The issue addressed by the *Columbus Country Club* court was whether the Club was "controlled by" or "operated in conjunction with" a religious organization so as to fall within the exemption's scope.⁶² The majority found that the language of the exemption should be interpreted to require a formal, mutual relationship between a church and an entity seeking exempt status.⁶³ The

(a) Nothing in this title shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin. Nor shall anything in this title prohibit a private club not in fact open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such lodgings to its members or from giving preference to its members.

Civil Rights Act of 1968, § 807, Pub. L. No. 90-284, 82 Stat. 81, reprinted in 1968 U.S.C.C.A.N. 102 (codified as amended at 42 U.S.C. § 3607 (1988)). The current § 3607 substitutes the word "subchapter" for the word "title." 42 U.S.C. § 3607 (1988).

58. *Columbus Country Club*, 915 F.2d at 882.

59. *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978).

60. The courts that have considered the Act's legislative history have looked to the 1968 history, not the 1966 history. They have therefore concluded that no reports are available regarding the Act, and that the legislation was essentially passed as submitted. Thus, the *Columbus Country Club* court stated that "[s]ince [the Fair Housing Act] was enacted with only minimal changes from the way it was first introduced by Senator Dirksen on the floor of the Senate, its legislative history does not include the committee reports and other documents that usually accompany major legislation." *Columbus Country Club*, 915 F.2d at 882 n.3 (referring to *Rizzo*, 564 F.2d at 147 n.29).

While some legislative history is available concerning the 1968 version of the Act itself, the record is almost bare as to the intent behind the 1968 version of the religious organization exemption contained in § 3607 of the Fair Housing Act. See *supra* notes 50-53 and accompanying text for a discussion of the 1966 version of the exemption.

61. The majority and dissent agreed that the crucial determination was whether the Club was "operated, supervised or controlled by or in conjunction with a religious organization." *Columbus Country Club*, 915 F.2d at 882. See *infra* notes 104-06 and accompanying text.

62. See *supra* note 57 for the text of the exemption.

63. *Columbus Country Club*, 915 F.2d at 883.

court held that the Club was not exempt from the Act's provisions because the pertinent facts did not show such a formal, mutual relationship between the Club and the Church.⁶⁴

II. *UNITED STATES v. COLUMBUS COUNTRY CLUB*⁶⁵

A. *Facts*

The Tri-Council Country Club, later known as the Columbus Country Club, was established near Philadelphia, Pennsylvania in 1920 by the Knights of Columbus, an organization with close ties to the Roman Catholic Church.⁶⁶ "Annual" membership⁶⁷ was originally limited to persons who were members of the Knights of Columbus. Membership in the Knights of Columbus was limited to Roman Catholic males.⁶⁸

The Club's original charter stated that the Club's purpose was to provide for "social enjoyments, in order to cultivate cordial relations and sentiments of friendship among its members and provide accommodations for social intercourse, outdoor sport, and healthful recreation."⁶⁹ The Club's official history characterized the Club as a "Catholic organization" and a "vacation group."⁷⁰ However, it had no formal or legal connection with the Catholic Church.⁷¹

Title to the land on which the Club was situated was originally held by a nonprofit corporation called the "Tri-Council of the Knights of Columbus."⁷² The Club grounds, consisting of approximately

64. *Id.*

65. 915 F.2d 877 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991).

66. *Id.* at 878-79.

67. Voting rights and ownership of summer bungalows located on the club's grounds were restricted to "annual" members. *Columbus Country Club*, 915 F.2d at 879. "Associate" or "social" members were usually relatives or friends of annual members. They did not have the same rights as "annual" members and were not required to be either male or Roman Catholic. *Id.*

68. *Id.*

69. *Id.*

70. *United States v. Columbus Country Club*, No. 87-8164, 1989 WL 149935 at *5 (E.D. Pa. Dec. 6, 1989). These facts were set out in the opinion of the district court, which decided in favor of the Club upon its motion for summary judgment. The district court examined certain facts in greater detail than did the Third Circuit majority. The Third Circuit dissent relied more heavily on facts set out in the district court's opinion than did the majority.

71. *Columbus Country Club*, 915 F.2d at 879.

72. *Columbus Country Club*, 1989 WL 149935 at *1. The Club had retained its nonprofit status and was exempt from federal income taxation. Interestingly, the Club was not exempt under the Internal Revenue Code provision that exempts religious organizations. 26 I.R.C. § 501(c)(3) (1988). It was exempt under the provision applicable to clubs "organized for pleasure, recreation, and other nonprofitable purposes." 26 I.R.C. § 501(c)(7)

twenty-three acres of land, contained a chapel, a grotto, a club house, and various recreational facilities and summer cottages.⁷³ Annual members were allowed to erect summer cottages on Club grounds at their own expense. The cottages were owned by the members who constructed them, although the Club's members collectively owned the land on which the cottages stood.⁷⁴ A cottage could be sold or transferred by testamentary disposition, but only with the Club's permission.⁷⁵ Since only male Roman Catholics were allowed to become annual members, and since only annual members could own cottages, the cottages could only be passed to male Roman Catholics.⁷⁶

Because the Club was comprised largely of Roman Catholics, members desired that certain religious ceremonies be conducted on Club grounds. For instance, Club members had always recited the rosary on Club grounds.⁷⁷ In 1922, the Archbishop of Philadelphia gave the Club "special permission for the celebration of mass" on the Club's premises every Sunday throughout the summer.⁷⁸ The Archbishop also provided for a priest to celebrate the mass.⁷⁹

Mrs. Anita Gualteri, an associate member of the Club, attempted to become an annual member in 1986, because she wished to purchase the leasehold on a summer cottage on Club grounds that had previously belonged to her father.⁸⁰ The Club initially denied Mrs. Gualteri permission to purchase the leasehold because she was a wo-

(1988). See Brief for the Appellee, *Columbus Country Club* at 11 n.5, *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990) (No. 90-1196), *cert. denied*, 111 S. Ct. 2797 (1991).

73. *Columbus Country Club*, 915 F.2d at 879.

74. *Id.*

75. *Id.*

76. See *supra* note 67 and accompanying text. The Club's charter was amended in 1922, pursuant to a reorganization of the Club due to certain financial difficulties. Its name was changed to Columbus Country Club, and annual members were no longer required to be affiliated with the Knights of Columbus. *Columbus Country Club*, 915 F.2d at 879. However, annual membership was still restricted to Roman Catholic males. That restriction continued until 1987. *Id.* at 879 n.1. In 1987, the Club began to allow women to become annual members, but they were still required to be Roman Catholics. *Id.* at 880.

77. *Columbus Country Club*, 915 F.2d at 879.

78. *Id.*

79. *Id.*

80. *Id.* at 879 & n.2. Mrs. Gualteri's father had died, and the leasehold had passed to his wife, Mrs. Gualteri's mother. Because she was a woman, Mrs. Gualteri's mother was not entitled to annual membership in the Club, but she was able to retain her husband's leasehold interest in the property. *Id.* at 879. She wished to sell the leasehold interest to her daughter. However, the Club informed Mrs. Gualteri that she could not purchase the cottage because, as a woman, she was ineligible for annual membership. *Id.* at 879-80. Her husband was not eligible for annual membership because he was not a Roman Catholic. *Id.* at 880.

man.⁸¹ She complained to the Cardinal's Commission on Human Rights and Urban Ministry. The Archdiocese, after investigating Mrs. Gualteri's allegations, threatened to withdraw its permission for weekly mass at the Club unless the Club discontinued its practice of excluding women from annual membership.⁸² The Club then altered its bylaws to allow women to become annual members.⁸³ It also added other provisions to the bylaws at this time. Previously, the Club's bylaws had not specifically mentioned any requirement of members' affiliation with the Roman Catholic Church, although it had always been the Club's policy to require such affiliation in practice.⁸⁴ In 1987, however, the "Purpose" section of the bylaws was amended to require that any prospective member obtain a written statement from his or her parish priest concerning the applicant's good standing in the Roman Catholic Church.⁸⁵ This section also mentioned, for the first time, the importance of the religious aspects of the Club.⁸⁶ Both of these facts had previously been recognized by the Club and were observed in practice. However, they had never expressly been set out in any Club document prior to 1987.⁸⁷

After the bylaws had been amended to allow women to apply, Mrs. Gualteri applied again for annual membership, and was again denied.⁸⁸ The Board of Governors' stated reason for the denial was the Gualteri family's "demonstrated lack of ability to get along with the community and lack of interest in the religious aspects of the community."⁸⁹ Mrs. Gualteri apparently believed that the denial was retaliatory in nature and that it was based on her complaints to the Church authorities about the Club's previous gender-based discrimination.⁹⁰ She notified the Department of Justice, Civil Rights Division, which eventually filed a civil suit against the Club in federal court, alleging a pattern and practice of discrimination based upon sex

81. *Columbus Country Club*, 915 F.2d at 880.

82. *Id.*

83. *Id.*

84. *Id.* at 879.

85. *Id.* at 880.

86. *Id.* The Club's position was that the bylaws were amended to formally reflect its religious "mission," which had existed since the Club's inception. Brief for the Appellee, *Columbus Country Club* at 11 n.4, *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990) (No. 90-1196), *cert. denied*, 111 S. Ct. 2797 (1991).

87. *Columbus Country Club*, 915 F.2d at 879.

88. *Id.* at 880.

89. *Id.*

90. *Columbus Country Club*, 1989 WL 149935 at *2.

and upon religion, both in violation of the Fair Housing Act.⁹¹

In response to the government's complaint, the Club did not deny that it discriminated on the basis of religion.⁹² Instead, the Club argued that the Fair Housing Act did not apply for two reasons: first, it argued that it fit within the Act's private club exemption, and the cottages were not "dwellings" for purposes of the Act; second, it asserted that even if the cottages were "dwellings," it fit within the Act's religious organization exemption.⁹³

The Club moved for summary judgment, and the district court held that although the cottages were "dwellings" for purposes of the Act, the Club did fall within both the religious organization and private club exemptions.⁹⁴ Because the district court held that the Club was exempt from the Act, the Club could discriminate against Mrs. Gualteri on the basis of religion without violating federal law.

B. *The Third Circuit's Treatment of the Case*

The government appealed from the district court's decision. On appeal, the Club argued that it fit within the religious organization exemption because, while it was not itself a "religious organization," it was "affiliated with" or "operated in conjunction with" the Catholic Church.⁹⁵ The Club alleged that it was in fact directly affiliated with, or operated in conjunction with, the Archdiocese because of its religious activities, which the Archdiocese permitted.⁹⁶ The Club contended that the dictionary meaning of the words "in conjunction with" included any type of relationship between the religious organization and the entity seeking to benefit from the exemption.⁹⁷ The Club asserted that, even though the Church did not require it to carry on any particular activities, the fact that the Church had specifically

91. *Columbus Country Club*, 915 F.2d at 880. Section 3614 of the Fair Housing Act provides as follows:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

42 U.S.C. § 3614(a) (1988).

92. *Columbus Country Club*, 915 F.2d at 880.

93. *Id.* at 880-82.

94. *Id.* at 880.

95. *Id.* at 882.

96. *Id.* at 882-83. See *supra* text accompanying notes 77-79 for a discussion of the Club's religious activities.

97. *Id.* at 883.

permitted the Club to hold mass on Club grounds meant that it was operated "in conjunction with" the Church according to the plain meaning of that phrase.⁹⁸ The Club argued that this conclusion was required by a broad interpretation of the exemption's language, which itself was required by Congress' "sensitivity to first amendment rights."⁹⁹

The Third Circuit did not agree.¹⁰⁰ It held that the Club did not meet the standards for inclusion in either the religious organization exemption or the private club exemption.¹⁰¹ The majority found that the Club did not fall within the religious organization exemption because there was no formal or mutual relationship between the Club and the Church, and therefore, the Club was neither controlled by nor operated in conjunction with the Church.¹⁰²

98. *Id.*

99. *Id.* at 882-83.

100. The case was heard by a three member panel of the Third Circuit. *Id.* at 878. The panel consisted of Justices Mansmann, Greenberg, and Seitz. The Third Circuit denied the Club's petition for rehearing en banc on December 18, 1990 by a 7-5 vote. *Id.* at 888.

101. *Id.* at 883, 885. The court held that for an organization to fall within the private club exemption five conditions must be met:

The defendant must (1) be a "private club not in fact open to the public"; (2) provide "lodgings"; and (3) only limit the "rental or occupancy of such lodgings." Furthermore, if a defendant provides "lodgings," those lodgings must be: (4) provided "as an incident to its primary purpose or purposes"; and (5) owned or operated "for other than a commercial purpose."

Id. at 884.

The majority found (and the dissent did not disagree) that the United States' interpretation of the private club exemption was correct. The United States had argued that even though the Club was private and not in fact open to the public, it did not provide "lodgings" because the bungalows were not temporary accommodations, but summer residences. *Id.* at 884-85. The court held that "lodgings" refers to temporary accommodations, whereas "dwellings" refers to more permanent, long-term accommodations. *Id.* In examining the private club exemption's legislative history, the majority found that Congress had expressly replaced the word "dwellings" with the word "lodgings." The court found that Congress made this replacement in order to limit the private club exemption's scope. *Id.*

The court further noted that, in the process of amending the private club exemption, when Congress substituted the word "lodgings" for the word "dwellings," it also deleted the word "sale" from the private club exemption, leaving only the words "rental or occupancy." *Id.* at 885. Notwithstanding the Club's argument that by limiting the sale of the bungalows it was also limiting their occupancy, the majority held that the defendant's policy or practice fell outside the plain language of the statutory exemption. *Id.*

102. *Id.* at 882-83.

1. The Majority's Interpretation Of The Religious Organization Exemption¹⁰³

Since the Club did not contend it was a religious organization,¹⁰⁴ it needed to prove it was a "nonprofit organization 'operated, supervised or controlled by or in conjunction with' a religious organization."¹⁰⁵ Perhaps because the Club was not owned, supervised, or controlled by the Church, all parties agreed that the crucial question was whether the Club was "'operated, supervised or controlled . . . in conjunction with a religious organization.'"¹⁰⁶ The majority agreed with the government's contention that an entity must have a formal, mutual relationship with the religious organization in question in order for the exemption to apply.¹⁰⁷

The majority disagreed with the Club's suggestion that the exemption's language should be read broadly. It held that because the Fair Housing Act's purpose was remedial, the Act as a whole must be given a broad interpretation,¹⁰⁸ and therefore, as a logical corollary,

103. The majority opinion was written by Judge Seitz, and was joined by Judge Greenberg. *Id.* at 877.

104. The Club argued before the district court, in its Petition for Rehearing En Banc, and in its Petition for a Writ of Certiorari to the United States Supreme Court, that it was a "religious organization" within the plain meaning of that phrase. The district court rejected this argument. *Columbus Country Club*, 1989 WL 149935 at *5. The Third Circuit apparently did not consider this argument.

105. *Columbus Country Club*, 915 F.2d at 882 (quoting 42 U.S.C. § 3607(a) (1988)). See *supra* note 57 for the text of the exemption.

106. *Columbus Country Club*, 915 F.2d at 882 (quoting 42 U.S.C. § 3607(a) (1988)).

107. *Columbus Country Club*, 915 F.2d at 883.

108. *Id.* at 882-83. As support for its position that the Act as a whole should be read broadly, the majority cited *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) and *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

The *Trafficante* Court focused its decision upon the meaning and scope of a "person aggrieved" who is entitled to file a private lawsuit under the Act. At the time of the *Trafficante* action, § 810(a) of the Act provided that the Secretary of Housing and Urban Development ("HUD") could investigate complaints filed with it by "persons aggrieved" by discriminatory procedures that have occurred or are about to occur. *Trafficante*, 409 U.S. at 208. Section 810(c) provided that HUD was required to refer the complaint to the appropriate state agency. *Id.* at 207 n.3. The state agency was unable to proceed against the defendants, and referred the complaints back to HUD. *Id.* at 207. Section 810(d) of the Act provided that if HUD failed to obtain the offending party's voluntary compliance within 30 days, the "aggrieved person" could sue in the appropriate district court. *Id.* at 208-09; see 42 U.S.C. §§ 3610-14 (1988).

In *Trafficante*, two residents of an apartment complex had sued under the Act, alleging that the landlord's discrimination against *other* persons had injured the plaintiffs. *Trafficante*, 409 U.S. at 206-08. The court of appeals had dismissed the complaint, holding that only persons who have actually been discriminated against are "persons aggrieved" under the Act. *Id.* at 208. The Supreme Court reversed. It found that "the language of the Act is broad and inclusive," and that Congress had considered fair housing to be "of the highest

any exemptions to the Act must be narrowly construed.¹⁰⁹ Accordingly, the court held that the meaning of the phrase “in conjunction with” in the exemption must also be construed narrowly.¹¹⁰ The court stated that a narrow construction of the words “in conjunction with” would require that a mutual relationship exist between the Church and the Club in order for the exemption to apply.¹¹¹

The court held that the relationship between the Club and Church could not be viewed only from the Club’s perspective. It noted that the Club benefitted from the relationship because the Church made a priest available and granted permission for mass to be held on Club grounds every Sunday during the summer.¹¹² However,

priority.” *Id.* at 209-11. The Court held that since HUD had no power to enforce the Act, and since the Attorney General could only institute a suit in a “pattern or practice” situation, suits by private individuals were the primary means of enforcement of the Act. *Id.* at 210-11. The Court held that “We can give vitality to [the section defining ‘persons aggrieved’] only by a generous construction which gives standing to sue to all in the same housing unit who are injured.” *Id.* at 212. The Court based its determination in part upon an examination of the standing provisions of Title VII contained in *Hackett v. McGuire Bros.*, 445 F.2d 442 (3d Cir. 1971). *Trafficante*, 409 U.S. at 209.

The *Columbus Country Club* majority also cited the Third Circuit’s decision in *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977). In *Rizzo*, the Third Circuit held that “the stated Congressional purpose demands a generous construction of Title VIII,” and went on to note that the United States Supreme Court had held that both Title VIII and Title VII should be construed “broadly so as to end discrimination.” *Id.* at 147 (citing *Trafficante*, 409 U.S. at 211).

Both the *Rizzo* court and the *Trafficante* Court found that the Fair Housing Act and Title VII (the employment discrimination section) of the Civil Rights Act of 1966 were so similar as to make comparisons between their provisions desirable, at least as far as interpreting the two statutes’ standards with respect to a plaintiff’s standing to sue and a defendant’s rebuttal of a showing of a prima facie case by the plaintiff. *Rizzo*, 564 F.2d at 148; *Trafficante*, 409 U.S. at 209.

The court in *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980), *aff’d in part and rev’d in part*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982), also held that the Fair Housing Act should be construed broadly. “The Act . . . is to be construed generously to ensure the prompt and effective elimination of all traces of discrimination within the housing field.” *Id.* at 1053.

109. *Columbus Country Club*, 915 F.2d at 883 (citing *United States v. Hughes Memorial Home*, 396 F. Supp. 544, 550 (W.D. Va. 1975)). The *Hughes* court, while not specifically addressing the religious organization exemption, characterized it as “limited.” *Hughes*, 396 F. Supp. at 550. See *supra* note 9.

110. *Columbus Country Club*, 915 F.2d at 883.

111. *Id.*

112. *Id.* The Club asserted that this privilege was “rare and unusual,” because the Club was the only community of its kind to have ever been granted permission for masses to be said outside a church on a regular basis. The Club alleged that since the privilege was rare and unusual, this was evidence of its mutual relationship with the Church. Brief for the Appellee, *Columbus Country Club*, at 3, *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990) (No. 90-1196), *cert. denied*, 111 S. Ct. 2797 (1991). However, it is equally arguable that if few other groups had been granted such a privilege, then this type

the court held that since the Club did little or nothing in return for these privileges, no mutual relationship between the Club and the Church existed.¹¹³

The majority further found that the Church's ability to withdraw its permission to hold mass on Club grounds¹¹⁴ was not enough, by itself, to hold that the Club was operated in conjunction with the Church.¹¹⁵ The court held that evidence pertaining to the Club's holding mass was proof of the Club's "unilateral activities," but did not show a mutual relationship between it and the Church.¹¹⁶ The court stated that evidence of such unilateral activities would be relevant to determine whether the Club *was* a religious organization, but was not relevant to determine whether it was operated in conjunction with one.¹¹⁷

2. The Dissent's Interpretation of the Religious Organization Exemption¹¹⁸

The only point of difference between the majority and dissenting opinions concerned the proper interpretation of the religious organization exemption, and specifically, the proper interpretation of the terms "controlled by" and "operated in conjunction with" contained in the exemption. The dissent asserted that the Club was "controlled by" or "operated in conjunction with" a religious organization so as to fall within the exemption's ambit.¹¹⁹ The dissenting judge first contended that no case law had interpreted the exemption.¹²⁰ Since she also found the legislative history to be "equivocal" as it related to the ex-

of privilege was not one that the Church would normally think of as creating any kind of "relationship."

113. *Columbus Country Club*, 915 F.2d at 883.

114. *See supra* text accompanying note 82.

115. *Columbus Country Club*, 915 F.2d at 883. Because the case was before the Third Circuit on the government's appeal from the lower court's grant of the Club's motion for summary judgment, the court was only concerned with whether the facts, as presented by the Club in support of its motion, were sufficient to hold that it fell within the exemption as a matter of law. *Id.* at 885.

116. *Id.*

117. *Id.*

118. Judge Mansmann dissented from the majority of the three-judge panel. *Columbus Country Club*, 915 F.2d at 885.

119. *Id.* at 885-88 (Mansmann, J., dissenting).

120. *Id.* at 885, 886 & n.1. *See supra* note 9. The United States District Court for the Western District of Virginia did address the exemption in a limited context in *United States v. Hughes Memorial Home*, 396 F. Supp. 544 (W.D. Va. 1975). However, the *Columbus Country Club* dissent did not seem to think that the *Hughes* court had actually interpreted the exemption.

emption,¹²¹ she stated that any analysis of the exemption must be based upon two factors: the statutory language and the facts of the case.¹²²

After examining the statutory language, the dissent determined that Congress had not intended courts to construe the religious organization exemption narrowly.¹²³ In support of this position, the dissent referred to Congress' use of the disjunctive form, as opposed to the conjunctive form, in the exemption's language. The dissent's position was that the congressional intent was to exempt any organization "that is 'operated by' or 'supervised by' or 'controlled by' or 'operated in conjunction with' or 'controlled in conjunction with' a religious organization."¹²⁴

The dissenting judge also disagreed with the majority's position that the words "in conjunction with" must be construed as requiring a mutual relationship between the Church and the Club. She stated that "[i]f Congress had meant to make control or mutuality the determinative evaluative criterion, it certainly would have expressed this intention more clearly."¹²⁵ According to the dissent, statutory language can only be construed differently from the meaning commonly attributed to it in two circumstances: if the contrary appears from an examination of the legislative history, or if case law has established an alternative meaning.¹²⁶ The dissenting judge concluded that since the

121. *Columbus Country Club*, 915 F.2d at 887.

122. *Id.* at 886.

123. *Id.* at 885. See *supra* note 109 and accompanying text for a discussion of the majority's contrary conclusion.

124. *Id.* at 887 (emphasis added). The dissent's characterization of the statutory language as disjunctive does not seem to comport with the actual words found in the statute. While the dissent stated that the exemption used the disjunctive form, the statutory language itself is not actually as disjunctive as the language set out in the dissenting opinion. The exemption in fact provides that an organization will be exempted if it is "operated, supervised or controlled by or in conjunction with a religious organization or society." 42 U.S.C. § 3607 (1988). For the text of the entire exemption, see *supra* note 57.

125. *Columbus Country Club*, 915 F.2d at 887 (Mansmann, J., dissenting).

126. *Id.* The dissent referred to *Caminetti v. United States*, 242 U.S. 470 (1916), for the proposition that "[s]tatutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense and with the meaning commonly attributed to them." *Id.* at 485-86.

Caminetti addressed statutory language very different from the language at issue in *Columbus Country Club*. The statute in question in *Caminetti* was the White Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-24 (1988)). The Mann Act made it illegal to "knowingly transport, or cause to be transported . . . in interstate commerce, any woman or girl for the purpose of prostitution or . . . for 'any other immoral purpose.'" *Caminetti*, 242 U.S. at 485 (emphasis added). The defendant in *Caminetti* contended that the words "any other immoral purpose" did not apply to him, as the Act only applied to persons transporting women for purposes of pecuniary gain,

contrary did not appear from the legislative history or other case law, the words "in conjunction with" must be used in their ordinary and usual sense.¹²⁷ The dissenting judge asserted that the ordinary and usual sense of the phrase "in conjunction with" does not include mutuality.¹²⁸ The dissent therefore found that the majority had construed the words "in conjunction with" more narrowly than their common meaning by requiring a mutual relationship between the Church and the Club.¹²⁹

The dissent then examined the facts of the case, placing special emphasis upon the Club's history and its relationship with the Church. The dissent imputed great significance to the following facts: the Club grounds were dedicated in a special religious ceremony when the Club initially opened; the Archbishop granted the Club "special permission" to have mass celebrated every Sunday in the summer season and provided the Club with a priest to celebrate the mass; every

whereas he had transported a woman across state lines in order to have her live with him as his mistress. The Court held that the words "immoral purpose" were plain and unambiguous, and included Caminetti's behavior within their scope. The Court referred to the "views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman." *Id.* at 487.

The dissenting judge in *Columbus Country Club* referred to this case in support of her contention that unambiguous statutory words must be interpreted in their ordinary and usual sense. However, the *Caminetti* Court was interpreting language that, although obviously unambiguous in 1916, would perhaps be viewed as ambiguous today.

127. *Columbus Country Club*, 915 F.2d at 887-88 (Mansmann, J., dissenting).

128. *Id.* The dissent did not, however, cite to any authority for the dictionary meaning of the term "in conjunction with."

"Conjunction" has been defined as "joining together, marriage union, connexion of ideas, . . . the fact or condition of being conjoined." OXFORD ENGLISH DICTIONARY 740 (2d ed. 1989). "Conjoined" is defined as "joined together, united, combined, allied." *Id.* at 737. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 479 (1961) defines "conjoin" as "to join together for a common purpose." "Conjunctive" is defined as "connecting in a manner denoting union." BLACK'S LAW DICTIONARY 302 (6th ed. 1990).

The concept of mutuality is not entirely excluded from these definitions. If the term "in conjunction with" admits of any ambiguity, then a court should look to Congress' intent when enacting either the exemption or the statute as a whole.

The Club argued in its Petition for Rehearing En Banc that it was affiliated with the Church rather than operated in conjunction with the Church. The Club stated that Webster's Ninth New Collegiate Dictionary defines "affiliated with" as "connected with," and that this term does not imply mutuality. Defendant's Petition for Rehearing En Banc at 6, *Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990) (No. 90-1196).

In response, the government argued that the proper inquiry was whether the Club was operated in conjunction with the Church. It stated that Webster's Ninth New Collegiate Dictionary defines "conjoin" as "to join together (as separate entities) for a common purpose." The government argued that joining two or more entities together for a common purpose requires a mutual relationship. United States' Opposition to Defendant's Petition for Rehearing En Banc at 6 n.7, *Columbus Country Club* (No. 90-1196).

129. *Columbus Country Club*, 915 F.2d at 887 (Mansmann, J., dissenting).

evening during the summer months, member families met to pray in the Club's chapel; and the Club's Sunday offering was always given to the local parish.¹³⁰ Furthermore, the dissent noted that the pastor of the local parish had submitted an affidavit with the Club's motion for summary judgment. This affidavit stated that the Club was a community of Roman Catholic families and comprised a "Roman Catholic organization"; that the privilege of mass every Sunday is a "rare and unusual privilege"; and "the Roman Catholic church recognizes and approves of the assembly of a group of Roman Catholic families for a summer retreat of weekly worship and daily prayer together as a valuable and legitimate exercise of their religious beliefs."¹³¹ Consequently, the dissent concluded that, even if the proper standards for interpreting the language of the exemption were mutuality or control, these facts indicated that the Club had met these standards.¹³²

If the standard were control of the Club by the Church, the dissenting judge agreed with the district court's concession that "as a strictly legal proposition," the Club was not controlled by the Church.¹³³ However, because of the Church's ability to "grant or withhold the privilege of holding services in the Club chapel—a privilege which is central to the traditional operations of the Club—" the dissent agreed with the district court's contention that the Church did, in effect, have "a significant degree of control over the Club."¹³⁴ The dissent found that the Church had in fact used this control over the Club in "bringing it into compliance with the Church's policy

130. *Id.* at 886.

131. *Id.* at 886-87. The parish priest had testified before the district court that the Club was a Catholic organization. However, the Catholic Church itself takes the position that some sort of formal relationship is required before any institution can call itself "Catholic." For a detailed discussion of these requirements, see Francis G. Morrissey, O.M.I., *What Makes an Institution "Catholic?"*, 47 *JURIST* 531 (1987). The 1983 Code of Canon Law provides certain specific criteria of Catholicity: 1) relationship or accountability to diocesan bishop or some other competent ecclesiastical authority; 2) control or supervision by competent ecclesiastical authority; or 3) recognition by way of written document. *Id.* at 535-36. "No private association of the Christian faithful in the Church is recognized unless its statutes are reviewed by the competent authority." *Id.* at 536 (citing 1983 Code c. 299, § 3). Separate incorporation does not in and of itself sever ties with the Church if the organization has already met the first two essential criteria, for example, if the organization was originally recognized by, and accountable to, the Church. *Id.* at 538. However, until an association's status has been reviewed by the Church, the group has no standing as a Catholic organization. *Id.*

132. *Columbus Country Club*, 915 F.2d at 888.

133. *Id.* at 887 (citing *United States v. Columbus Country Club*, No. 87-8164, 1989 WL 149935, at *5 (E.D. Pa. Dec. 6, 1989)).

134. *Id.*

against sex discrimination."¹³⁵

On the other hand, if the standard were a mutuality of relationship between the Club and Church, the dissent asserted that this standard was satisfied for two reasons: the Church granted the privilege of celebrating mass on Club grounds, and the Club's members adhered to the tenets of the Roman Catholic faith and donated the mass' weekly offering to the local parish. The dissent concluded that "[t]he persons who, over the years, have operated and controlled the Club have do [sic] so "in conjunction with" their continuing obligations as members of the Roman Catholic faith.'"¹³⁶ The dissenting judge was of the opinion that these facts established that the Club was in fact operated in conjunction with the Church, and thus entitled to the benefit of the Act's exemption.¹³⁷

The *Columbus Country Club* dissent's approach to the Act's religious organization exemption would provide an opportunity for organizations with few formal ties to a church to discriminate on religious grounds.¹³⁸ The majority's narrower approach, on the other hand,

135. *Id.* at 888. This comment, regarding the Church's policy against sex discrimination, is apparently a reference to the Church's response to Mrs. Gualteri's complaint to it after being denied membership in the Club because of her sex. The Church's action took place prior to Mrs. Gualteri's request that the government file suit due to the Club's second denial of annual membership status. See *supra* notes 80-83 and accompanying text.

136. *Columbus Country Club*, 915 F.2d at 887 (Mansmann, J., dissenting) (quoting *Columbus Country Club*, No. 87-8164, Slip Op. at 10-11 (E.D. Pa. 1989)).

The dissenting judge was also dissatisfied with the possible constitutional implications of the majority's narrow construction of the exemption. She referred to the "First Amendment implications" of the case. *Id.* at 888. Her apparent concern, while not fully articulated, seemed to be that the majority's rule would negatively impact upon the Club members' free exercise rights. The dissent also expressed concern over the impact of this decision upon similar groups of religious individuals who gather together to express their beliefs. *Id.* These considerations were not addressed by the majority opinion because the district court had not addressed them. See *supra* note 15 and *infra* note 227. See also *infra* notes 229-42 for a discussion of the district court's treatment of these constitutional issues on remand.

137. *Columbus Country Club*, 915 F.2d at 888.

138. In its Petition for Rehearing En Banc, the Club argued that a narrow interpretation of the exemption (requiring a mutual relationship between the organization seeking the exemption and a church) would eliminate the possibility of groups such as the Quakers, who, it said, have no relationship with any structured church body, ever being able to operate a summer camp for Quakers. The Club argued that no mutuality can exist if there is no church with which the group could have a mutual relationship. See Appellee Columbus Country Club's Petition for Reargument En Banc at 2-3, *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990) (No. 90-1196), *cert. denied*, 111 S. Ct. 2797 (1991).

Notwithstanding the Club's arguments, a narrow interpretation of the exemption would not prevent the Quakers from operating a summer camp. It would prevent them from discriminating amongst campers on the basis of religion. The group might lose its exclusively Quaker character if someone belonging to another religion wished to join. The

would limit the number and type of groups able to take advantage of the exemption. Such a limitation would arguably promote the general aim of the Act by reducing the number and type of entities that are allowed to practice religious discrimination in housing.

Both the *Columbus Country Club* majority and dissenting opinions confined their analyses to the Fair Housing Act. Neither opinion considered case law interpreting any other statute with a religious exemption. A similar exemption for religious organizations is contained in Title VII of the Civil Rights Act of 1964 ("Title VII").¹³⁹ Due to the similarity of the purposes of the two statutes, courts interpreting portions of the Fair Housing Act have found it helpful as an interpretive aid to refer to cases construing Title VII.¹⁴⁰ Furthermore, a comparison between the Fair Housing Act's exemption and the Title VII and state housing law religious organization exemptions is useful, not only because of the similarity of their purpose and language, but also because of the lack of case law interpreting the Fair Housing Act's exemption and the existence of case law interpreting the Title VII exemption and the state housing law exemptions. Thus, in order to determine which of the conflicting interpretations of the Fair Housing Act's religious organization exemption is correct, it is useful to consider case law interpreting the Title VII exemption and the state fair housing law exemptions.

III. THE TITLE VII RELIGIOUS ORGANIZATION EXEMPTION AND STATE FAIR HOUSING ACT EXEMPTIONS

A. *Purpose and Language of the Title VII Exemption*

Title VII provides that employers may not fail or refuse to employ, discharge, or otherwise discriminate against their employees on the basis of race, color, religion, sex, or national origin.¹⁴¹ However, like the Fair Housing Act, Title VII does exempt certain classes of "religious" employers from its provisions,¹⁴² and a substantial body of

group would, however, still be free to practice its religious beliefs. *See infra* note 230 and accompanying text.

139. The exemption provides that the prohibition on discrimination shall not apply to "a religious corporation, association, educational institution or society." 42 U.S.C. § 2000e-1 (1988) (original version at Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255).

140. *See supra* note 108. Similarly, courts addressing interpretation of Title VII have turned to case law construing the similar provisions of the Fair Housing Act. *See infra* note 152 and accompanying text.

141. 42 U.S.C. § 2000e-2(a)(1) (1988) (original version at Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255).

142. *See infra* note 147 for the text of the exemption.

case law exists interpreting that exemption.¹⁴³

Title VII provides an exemption for religious organizations and schools that is similar, but not identical, to the statutory language at issue in the Fair Housing Act's exemption. The Title VII exemption applies only to a religious corporation, association, or society.¹⁴⁴ Title VII does not contain the terms "operated in conjunction with," "controlled by," or "supervised by" which are included in the Fair Housing Act's exemption, and which were the subject of disagreement in the *Columbus Country Club* opinion.¹⁴⁵

The Title VII exemption, as originally enacted, had allowed religious corporations, religious associations, or religious societies to discriminate in employment on the basis of religion if the employee's work was "connected with" the organization's "carrying on" of its religious activities, or "connected with" the organization's "educational activities."¹⁴⁶ A 1972 amendment¹⁴⁷ enlarged the scope of the Title VII religious organization exemption. The current exemption allows religious discrimination by a religious corporation, religious association, religious educational institution, or religious society if the employee's work is connected with the carrying on of *any* of the organization's activities.¹⁴⁸

The constitutionality of the 1972 amendment to Title VII's religious organization exemption was questioned by various scholars¹⁴⁹

143. See *infra* notes 154-75 and accompanying text.

144. See *infra* note 147.

145. See *infra* text accompanying notes 213-14 for a comparison of the relevant statutory language of the two exemptions.

146. Prior to its amendment in 1972, the original exemption provided as follows: This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

Civil Rights Act of 1964, § 702, *reprinted in* 1964 U.S.C.C.A.N. 304 (current version at 42 U.S.C. § 2000e-1 (1988)).

147. The amended exemption provides as follows:

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities.

Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972), (amending § 702) (codified as amended at 42 U.S.C. § 2000e-1 (1988)).

148. See *supra* note 147.

149. Some commentators had stated that the 1972 amendment was on a direct colli-

and at least two courts,¹⁵⁰ but was affirmed by the Supreme Court in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.¹⁵¹

sion course with the Establishment Clause because the government, by classifying certain organizations as "religious," was defining or establishing religion. Furthermore, critics said that by offering exceptions to some groups and not to others on the basis of these governmental or judicial definitions of religion, the government was practicing discrimination on the basis of religion. See Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979). See also Sharon L. Worthing, "Religion" and "Religious Institutions" Under the First Amendment, 7 PEPP. L. REV. 313 (1980) (examining whether governmental definition of "religion" for purposes of tax exemption or statutory exclusions comes too close to an unconstitutional establishment of religion).

Other commentators have argued that the 1972 amendment to Title VII's religious organization exemption poses problems under the Free Exercise Clause. See Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987) (discussing the scope of exemptions, based on the Free Exercise Clause, from statutory prohibitions against employment discrimination, and concluding that a religious organization's "members-only" employment policies are consistent with accepted view of religious freedom and freedom of association).

150. See *Amos v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 594 F. Supp. 791 (D. Utah 1984), *vacated*, 618 F. Supp. 1013 (D. Utah 1985), *rev'd*, 483 U.S. 327 (1987); *King's Garden v. FCC*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

151. 483 U.S. 327 (1987), *rev'g Amos*, 618 F. Supp. 1013 (D. Utah 1985).

The Supreme Court held that the amended exemption, even as it applied to the secular activities of a religious organization, withstood scrutiny under the Establishment Clause of the First Amendment because it met the three-part test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The first prong of that test requires that the challenged law "have a secular legislative purpose." *Id.* at 612. The *Amos* Court held that this language only means that Congress must avoid a particular point of view when legislating regarding religious matters. It does not mean that the law must be totally unrelated to religion. *Amos*, 483 U.S. at 335. A permissible legislative purpose under the first part of the *Lemon* test is an aim to avoid governmental interference with religious organizations' abilities to "define and carry out their religious missions." *Id.* at 339. The Court noted that this purpose motivated the 1972 amendment to the Title VII exemption. *Id.*

The second prong of the *Lemon* test is satisfied if the law has a "'principal or primary effect . . . that neither advances nor inhibits religion.'" *Id.* at 336 (quoting *Lemon*, 403 U.S. at 612). The *Amos* Court held that the amended Title VII exemption satisfied this test, because "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Id.* at 337.

Finally, the *Amos* Court found that the amended exemption also satisfied the third prong of the *Lemon* test, which requires that the statute not impermissibly entangle church and state. *Lemon*, 403 U.S. at 613. The *Amos* Court held that, by prohibiting governmental inquiry into whether an employee is employed in a "religious" aspect of the organization's affairs, the 1972 version of the exemption does just the opposite of entangling church and state. *Amos*, 483 U.S. at 339.

Part IV of this Note examines whether the considerations the *Amos* Court addressed would apply if the constitutionality of the *Columbus Country Club* majority's interpretation of the Fair Housing Act's religious organization exemption were questioned. Part IV also

B. Case Law Interpreting the Title VII Exemption

Courts construing provisions other than the religious organization exemptions of the Fair Housing Act and Title VII have held that the similarities between these two statutes require a comparison between them.¹⁵² An analysis of how Title VII's religious organization exemption is applied might therefore shed some light on the wisdom of either the dissent's approach or the majority's approach in *Columbus Country Club*.

An examination of the case law that has interpreted Title VII's religious organization exemption indicates that an organization seeking to benefit from the exemption must have some formal ties with a church in order to qualify for the exemption. The organizations exempted from Title VII's requirements can be divided into four categories: (1) organizations that are in themselves considered "religious" organizations, (2) organizations that are wholly owned and operated by a church, (3) organizations that are privately owned and run for profit, and (4) privately owned, nonprofit organizations.¹⁵³

addresses whether any other constitutional challenges could appropriately be raised, and, if so, what the result would likely be.

152. EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981). The court held that "the strong similarities between the language, design, and purposes of Title VII and the Fair Housing Act require that the phrase 'a person claiming to be aggrieved' in § 706 of Title VII must be construed in the same manner that *Trafficante* construed the term 'aggrieved person' in § 810 of the Fair Housing Act." *Id.* at 482 (quoting *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)).

Interestingly, in reaching its decision to construe standing broadly under the Fair Housing Act, the *Trafficante* Court relied in part upon the decision to construe standing broadly in a Title VII case, *Hackett v. McGuire Bros.*, 445 F.2d 442 (3d Cir. 1971). The *Hackett* court's decision turned on the construction of § 706's "aggrieved person" phrase. That court found that Congress' intent was "to define standing as broadly as is permitted by Article III of the Constitution." *Id.* at 446. The *Trafficante* Court held that, "[w]ith respect to suits brought under the 1968 [Fair Housing] Act, we reach the same conclusion." *Trafficante*, 409 U.S. at 209.

Commentators have also urged that the criteria establishing a *prima facie* case under Title VII are equally applicable to suits under the Fair Housing Act. See Elliot M. Mincberg, Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 128 (1976).

See *supra* note 108 for a further discussion of cases holding that certain sections of Title VII and the Fair Housing Act should be similarly construed.

153. See *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360 (8th Cir. 1991) (not-for-profit hospital not owned by a church); *EEOC v. Townley Eng'g & Mfg.*, 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) (privately owned manufacturing corporation); *King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974) (radio station wholly owned by religious organization); *Amos*, 594 F. Supp. at 795-96 (business wholly owned by religious organization); *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983) (newspaper wholly owned by religious organization).

Courts dealing with organizations within the first category (entities that courts consider "religious" organizations) obviously do not examine whether there is any formal connection between two entities because the church and the organization seeking the exemption are one and the same. For example, many courts have accepted the proposition that the Salvation Army falls within the first category and is either a "religious corporation" or a religion in and of itself for purposes of the Title VII exemption.¹⁵⁴ However, cases dealing with organizations falling within the last three categories do require some type of formal connection between the organization seeking the exemption and a church, although the nature and extent of that connection varies from category to category.

Organizations that are within the second category, those owned and operated by a religious organization, necessarily have formal ties to the religious organization,¹⁵⁵ and thus almost always qualify for the exemption.¹⁵⁶ The Supreme Court held in *Amos*¹⁵⁷ that the exemp-

154. *Salvation Army v. New Jersey Dep't of Community Affairs*, 919 F.2d 183 (3d Cir. 1990); *McClure v. Salvation Army*, 323 F. Supp. 1100, 1101 (N.D. Ga. 1971), *aff'd*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972); *Salvation Army v. United States*, 138 F. Supp. 914 (S.D.N.Y. 1956); *Bennett v. City of La Grange*, 112 S.E. 482 (Ga. 1922).

155. In *King's Garden*, the court considered the Title VII exemption's application to a group of religious ministries that jointly owned a radio station for the purpose of promoting the ministries' common aim to "share Christ world wide." *King's Garden*, 498 F.2d at 52. The *King's Garden* court found that the group that owned the radio station was a religious organization. However, it also ruled that the station could not discriminate on the basis of religion in employment, because the court determined that FCC regulations, rather than Title VII and its exemption, applied to the station. *Id.* at 53. The court also determined that the 1972 amendment to the Title VII exemption was probably not constitutional, due to its perception that the 1972 amendment was in conflict with the Establishment Clause. *Id.* at 54-57. See *supra* note 151 and accompanying text for a discussion of the Supreme Court's decision in *Amos* that the 1972 amendment was constitutional.

In dicta, the *King's Garden* court stated that, if it were basing its decision on the Title VII exemption, and if the radio station had been incorporated separately from the religious organization, the exemption might not have applied. *King's Garden*, 498 F.2d at 54 n.7. However, the court went on to state that if separate incorporation presented a problem, religious groups could simply avoid separate incorporation of their "commercial enterprises," and thus take advantage of the exemption. *Id.*

156. Under the post-1972 exemption, any "religious corporation, association, educational institution or society" is exempt from Title VII's requirements concerning employees performing any work for the entity. 42 U.S.C. § 2000e-1 (1988). If the entity is a corporation that is wholly owned by the religious organization the exemption will apply even if the corporation is engaged in secular pursuits. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

The lower *Amos* court had set out a three-part test to determine whether the activities of an organization falling within the second category would qualify *under the pre-1972 exemption*. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 594 F. Supp. 791, 799 (D. Utah 1984), *vacated*, 618 F. Supp. 1015 (D.

tion is available for any activities of a "religious" corporation, association, educational institution, or society.¹⁵⁸ The entity with which the *Amos* Court was concerned was a wholly church-owned corporation that was engaged in relatively secular pursuits, manufacturing clothing and operating a gym.¹⁵⁹ The Supreme Court found that because the corporation was "a religious entity associated with the Church," it was entitled to the exemption.¹⁶⁰

Organizations within the third category (privately owned, for-profit entities) seem to encounter difficulties when they attempt to claim the benefit of the Title VII exemption. A relatively recent case in the Court of Appeals for the Ninth Circuit, *EEOC v. Townley Engi-*

Utah 1985), *rev'd*, 483 U.S. 327 (1987). The lower court's view was that the 1972 amendment to the exemption was unconstitutional because it violated the Establishment Clause. *Id.* at 804-28. The pre-1972 exemption applied only to the religious activities of a religious corporation, association, educational institution, or society. See *supra* note 146 for the text of the pre-1972 exemption.

The lower court's test required the court to scrutinize the connection between the church and the organization seeking the exemption in matters such as financial management and daily operation of the organization. *Amos*, 594 F. Supp. at 799. Then, the court should examine the connection between the religion's tenets and the activity in question and determine whether the activity is required by particular tenets of the religion. If the ties between the church and the organization seeking the exemption are relatively weak in these regards, the court must engage in a third inquiry, focusing on the relationship between the nature of the job being performed and the religious rituals or tenets of the particular religion. *Id.* The activity could only be deemed "religious" if the court found a "substantial relationship" between the two organizations, or between the particular job and the religious tenets of the religion in question. *Id.*

The *Amos* court granted summary judgment to the defendant employer with regard to the plaintiffs' wrongful discharge and emotional distress claims, but denied defendant's motion for summary judgment regarding plaintiffs' claims under federal and state employment discrimination law. *Id.* at 831. However, this decision was vacated to allow the United States to intervene. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 618 F. Supp. 1015 (D. Utah 1985), *rev'd*, 483 U.S. 327 (1987). Appeal was then taken directly to the Supreme Court after the district court affirmed its prior decision to grant summary judgment. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987).

The Supreme Court reversed the district court's decision to grant summary judgment, and affirmed the constitutionality of the 1972 amendment to the religious organization exemption. However, some of the standards contained in the district court's test under the pre-1972 exemption might still be applicable to an analysis of whether a particular organization is entitled to claim the post-1972 Title VII exemption. See *infra* notes 200-03 and accompanying text for an application of the *Amos* test to the facts of *Columbus Country Club*. See *infra* notes 244-54 and accompanying text for an application of the *Lemon* test to the *Columbus Country Club* majority's interpretation of the Fair Housing Act's exemption.

157. 483 U.S. 327 (1987).

158. *Id.* at 339.

159. *Amos*, 594 F. Supp. at 795-96.

160. *Amos*, 483 U.S. at 330.

neering & Manufacturing Co.,¹⁶¹ concerned an organization within the third category. Townley Engineering Company was a privately owned manufacturing business that was operated for profit.¹⁶² It attempted to claim the Title VII exemption based on the highly religious attitude of its owners, its dissemination of religious materials, and its financial contributions to churches.¹⁶³ The Ninth Circuit recognized that there was relatively little case law to aid in determining precisely the type of relationship that would qualify a privately owned, for-profit corporation for this exemption.¹⁶⁴ However, the court determined that the exemption did not apply.¹⁶⁵ It examined the legislative history of the Title VII exemption and found that Congress' intent was that "only those institutions with extremely close ties to organized religions would be covered."¹⁶⁶ The Ninth Circuit held that the appropriate test was whether the company's purpose and character were primarily religious or primarily secular. In applying that test to the facts of the case, the court determined that the company was primarily secular, since it was organized primarily for profit, was not affiliated with or supported by a church, and its articles of incorporation did not mention a religious purpose.¹⁶⁷ The court held that "the beliefs of the owners and operators of a corporation are simply not enough in themselves to make the corporation 'religious' within the meaning of [the exemption]."¹⁶⁸ The court declined to further define the scope of the exemption and stated that each case must be decided upon an examination of all pertinent facts.¹⁶⁹

Organizations within the fourth category, privately owned, non-profit corporations, may often have closer ties to a religious entity than corporations which are operated for profit. Since their purposes are often charitable or otherwise linked with the promotion of a religion's views, the church may have a vested interest in exercising some con-

161. 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

162. *Id.* at 611-12.

163. The corporation sent out a gospel tract with each mailing, printed biblical verses on all invoices and purchase orders, gave financial support to churches, and held devotional services once a week on company property during working hours. An employee objected to being forced to attend these services. During the subsequent suit against the corporation by the Equal Employment Opportunity Commission, the court held that the company did not fall within the Title VII exemption even though the owners' intent was that it would be a "Christian, faith-operated business." *Id.* at 612.

164. *Id.* at 618.

165. *Id.* at 617.

166. *Id.* at 618.

167. *Id.* at 619.

168. *Id.*

169. *Id.* at 618.

trol over the organization's operation. In *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*,¹⁷⁰ the Court of Appeals for the Eighth Circuit held that Title VII's prohibition against religious discrimination in employment could not apply to an organization falling within the fourth category.¹⁷¹ In *Scharon*, the plaintiff employee (a chaplain) claimed that she was fired in violation of Title VII.¹⁷² The court held that the hospital's admitted employment discrimination on religious grounds was not subject to suit under Title VII.¹⁷³ The hospital's articles of association provided that the church must approve any amendments to the hospital's articles of incorporation, and gave the church the power to nominate persons to the board of directors.¹⁷⁴ The court held that these factors were sufficient indicia of control by the church to show the hospital's affiliation with the church, and the hospital therefore was not subject to Title VII's requirements.¹⁷⁵

It should be noted that the tests discussed in this section have been formulated by different jurisdictions. Each jurisdiction will probably continue to use its own test regardless of the type of entity claiming the exemption. Thus, the Ninth Circuit might use the *Townley* test¹⁷⁶ even if it were presented with an entity other than a privately owned, for-profit corporation. Similarly, the Eighth Circuit might use the *Scharon* test¹⁷⁷ even if the organization claiming the exemption were not a privately owned, not-for-profit corporation. This Note classifies the different types of exempt organizations into four different categories for analytical purposes, not because a different test necessarily applies to each. Each court addressing the exemption's scope has based its ultimate decision on the presence or absence of control and/

170. 929 F.2d 360 (8th Cir. 1991).

171. *Id.* at 361-63. Interestingly, the *Scharon* court did not base its decision on an interpretation of the Title VII exemption. The court did not mention the exemption. Instead, it held that applying Title VII to the facts of the case would require constitutionally prohibited governmental entanglement with religion. *Id.* at 362.

172. *Id.* at 361.

173. *Id.* at 362. See *supra* note 171.

174. *Scharon*, 929 F.2d at 362.

175. *Id.* Because of the presence of church-appointed members on the hospital's board of directors and the requirement of church approval for any changes to the hospital's articles of incorporation, the court characterized the hospital as a "church-affiliated hospital, with 'substantial religious character.'" *Id.* (quoting *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 736 F. Supp. 1018, 1019 (E.D. Mo. 1990)). In dicta, the court stated that even though the hospital, in its relationship with the general public, could arguably be characterized as a secular organization, in its relationship with the plaintiff, who was employed by the hospital as a chaplain, the hospital was "without question a religious organization." *Id.*

176. See *supra* notes 161-69 and accompanying text.

177. See *supra* notes 170-75 and accompanying text.

or a formal relationship between the religious organization and the entity seeking to benefit from the exemption.¹⁷⁸

178. Courts dealing with wholly different concerns have also addressed considerations similar to those facing courts interpreting the scope of the Title VII exemption. For example, the presence or absence of control or a formal relationship between an entity and a church were addressed in *Kendrick v. Sullivan*, 766 F. Supp. 1180 (D.D.C. 1991). The *Kendrick* court developed a test that is similar to those developed in cases dealing with the Title VII exemption. The *Kendrick* court's decision ultimately rested upon whether or not certain organizations receiving grants under the Adolescent Family Life Act, Pub. L. No. 97-35, 95 Stat. 578 (1981) (codified as amended at 42 U.S.C. § 300z (1988)) ("AFLA") were so closely allied with organized religion that the funding would constitute government assistance to a religious group. *Kendrick*, 766 F. Supp. at 1181. The court examined whether AFLA, which provided financial support to groups assisting pregnant or sexually active teenagers, was in violation of the Establishment Clause as it applied to certain groups. *Id.* The Supreme Court had recently reversed the district court's decision that AFLA was facially unconstitutional. *Bowen v. Kendrick*, 487 U.S. 589 (1988), *rev'g*, 657 F. Supp. 1547 (D.D.C. 1987).

AFLA provides for the Secretary of the Department of Health & Human Services to administer grants to public or private non-profit organizations that offer care to pregnant or sexually active adolescents. *Kendrick*, 766 F. Supp. at 1182. The services funded include pregnancy testing, maternity counseling, and educational services designed to prevent premarital sexual relations among adolescents. *Id.*

The defendant was the Secretary of the Department of Health & Human Services. Plaintiffs contended that since some organizations connected with religious organizations were among the groups funded by the defendant pursuant to AFLA, the statute was unconstitutional as it applied to those organizations. Plaintiffs argued that because AFLA, by providing funding for those organizations, advanced religion and/or "foster[ed] an excessive entanglement of government and religion," it violated the Establishment Clause. *Id.* at 1183.

The court applied the *Lemon* test and determined that AFLA, as applied to those organizations, had a valid secular purpose, thus satisfying the first part of the test. *Id.* at 1184. See *supra* note 151 and accompanying text for the *Lemon* test.

The court then addressed whether AFLA had the primary effect of advancing religion by providing funding for religious organizations, which would render it unconstitutional under the second part of the *Lemon* test. *Kendrick*, 766 F. Supp. at 1184. In furtherance of that inquiry, the court had to determine whether the organizations funded through the statute's provisions were "pervasively sectarian" and whether their activity was "religious." *Id.*

The district court noted that the Supreme Court had mandated the use of this "pervasively sectarian" standard in its prior decision held that AFLA was facially constitutional. *Id.* at 1181 (referring to *Bowen v. Kendrick*, 487 U.S. 589 (1988)). The Supreme Court had stated that courts should consider factors such as whether an organization has "explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine" in their determination of whether an institution is "pervasively sectarian." *Bowen*, 487 U.S. at 620 n.16. On remand, the district court's determination of whether the grantees were pervasively sectarian turned on the grantees' formal religious affiliation. In assessing their formal religious affiliation, or lack thereof, the court scrutinized the following factors: statements of religious purpose in the grantees' by-laws; specific policies that forbade deviation from the doctrines or tenets of the religions with which the grantees were associated; and requirements that religious leaders sit on the organizations' boards of directors. *Kendrick*, 766 F. Supp. at 1185. The court also considered whether the grantees had reserved the right to discriminate in employment on the basis of

C. *State Fair Housing Statutes*

State court decisions interpreting religious organization exemptions in state fair housing statutes provide another source of interpretive standards which can assist a court seeking to interpret the Fair Housing Act's religious organization exemption. The legislative history of the Fair Housing Act contains a suggestion that in "borderline cases," courts should look to state housing laws for guidance.¹⁷⁹ Its unique factual situation makes *Columbus Country Club* a "borderline" case, and state law might provide some helpful insights.

Pennsylvania (the Club's location) and New York have housing statutes that contain religious organization exemptions remarkably similar to the Fair Housing Act's exemption.¹⁸⁰ While Pennsylvania courts have not interpreted the exemption, a New York court has done so in *Cowen v. Lily Dale Assembly*.¹⁸¹ *Lily Dale* was factually

religion, and whether the grantees' recruitment of new employees was carried out through religious organizations. *Id.* However, the district court was considering a motion for summary judgment. Since the existence of the determinative factors was disputed, the court held that the question of whether the grantees were in fact "pervasively sectarian" could not be decided as a matter of law. *Id.* at 1192.

The factors upon which the *Kendrick* court relied are similar to the factors considered by the courts that interpreted the scope of the Title VII exemption. A combination of some or all of these factors might be useful in an interpretation of the scope of the Fair Housing Act's exemption.

179. See *supra* note 48.

180. Pennsylvania's statute provides, in pertinent part, as follows:

Nothing in clause (h) of this section shall bar any religious or denominational institution or organization or any charitable or educational organization, which is operated, supervised or controlled by or in connection with a religious organization or any bona fide private or fraternal organization from giving preference to persons of the same religion or denomination or to members of such private or fraternal organization from making such selection as is calculated by such organization to promote the religious principles or the aims, purposes or fraternal principles for which it is established or maintained.

Pennsylvania Human Relations Act, 43 PA. CONS. STAT. ANN. § 955(i)(2) (1991).

The New York statute provides, in pertinent part, as follows:

Nothing contained in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

N.Y. EXEC. LAW § 296 (11), (McKinney 1982 & Supp. 1992).

181. 354 N.Y.S.2d 269 (App. Div. 1974). Plaintiff sued Lily Dale Assembly for discrimination on the basis of religion in connection with the rental of residential property on Lily Dale's premises. *Id.* at 270-71. Lily Dale owned 172 acres of land, containing religious, residential, and recreational buildings. *Id.* at 270. Lily Dale's bylaws stated that its

similar to *Columbus Country Club* in that *Lily Dale* involved a summer camp that wished to avoid selling a leasehold interest in camp property to a party who was not a member of the Assembly.¹⁸² The Assembly sought the protection of the state housing act's religious organization exemption. The court held that the Assembly was a religious institution within the meaning of the exemption, noting that it had received a charter from the National Spiritualist Association.¹⁸³ The court focused on the formal ties between the Assembly and the Association, which was considered a church.¹⁸⁴ The court discounted the secular contemporaneous educational use to which the Assembly's property was put, and instead relied on its formal affiliation with the Association.¹⁸⁵

All of the Title VII cases, and the state housing act case discussed in this section, were decided based upon the courts' analysis of the legal, formal, and/or factual connection between the organization seeking a religious exemption and a church. The analyses in which the different courts engaged are equally applicable to organizations seeking to claim the Fair Housing Act's exemption.

purposes included "benevolent, charitable, literary and scientific purposes and mutual improvement in the religious knowledge of Spiritualism." *Id.* Plaintiffs asserted that *Lily Dale* was not a religious organization within the meaning of the exemption. *Id.* at 271.

182. *Id.* at 270. The Columbus Country Club cited *Lily Dale* in support of its argument that the Club was itself a religious organization within the plain meaning of the term "religious organization." Appellee Columbus Country Club's Petition for Reargument En Banc at 5, *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990) (No. 90-1196), *cert. denied*, 111 S. Ct. 2797 (1991).

The Club also cited *Lake Brady Spiritualists Camp Ass'n. v. Brown*, 402 N.E.2d 1187 (Ohio 1980), in support of this proposition, although the statute at issue in *Lake Brady* was not a state fair housing act. In *Lake Brady*, the organization in question was a summer camp, containing a hotel, cottages, and a church. The organization had applied for a bingo license, but the relevant authorities denied its application. *Id.* at 1187-88. The Attorney General approved the denial on the ground that the organization was not a "religious organization." *Id.* The organization appealed, and the *Lake Brady* court held that the camp was a religious organization for purposes of the state law regulating the granting of bingo licenses. *Id.* at 1187. The camp's articles of incorporation specifically stated that the camp's purpose was investigating the phenomenon of modern spiritualism and promoting spiritualism. *Id.* at 1188 n.1. The statute at issue defined a "religious organization" as one that consisted of "any church, body of communicants, or group that is not organized or operated for profit, that gathers in common membership for regular worship and religious observances." *Id.* at 1188. The court found that the camp members did gather for regular worship and/or religious observances, and that the camp was thus a religious organization. *Id.*

It should be noted that the Fair Housing Act, the statute at issue in *Columbus Country Club*, contains no such definition of a religious organization. See 42 U.S.C. §§ 3601-19 (1988).

183. *Lily Dale Assembly*, 354 N.Y.S.2d at 271.

184. *Id.*

185. *Id.*

IV. APPLICATION OF THE TITLE VII TESTS, THE STATE HOUSING ACT TEST, AND CONSTITUTIONAL STANDARDS TO THE FAIR HOUSING ACT'S EXEMPTION

A. *Application of the Title VII Tests and State Housing Act Test to the Facts of United States v. Columbus Country Club*¹⁸⁶

In the case law interpreting the Title VII religious organization exemption¹⁸⁷ and the state housing act's religious organization exemptions,¹⁸⁸ the courts regarded a formal connection between a religious organization and the organization seeking exemption as an important, and often deciding, factor.¹⁸⁹ While Title VII exempts religious corporations, associations, educational institutions, or societies,¹⁹⁰ the Fair Housing Act's exemption not only embraces these religious organizations, but also covers organizations that are "operated, supervised, or controlled by or in conjunction with a religious organization."¹⁹¹ Thus, the language of the two exemptions differs to some extent. However, there are several reasons for utilizing case law interpreting the Title VII exemption to aid in determining what type of entity should benefit from the Fair Housing Act's exemption.

The purposes behind Title VII and the Fair Housing Act were the same—to end discrimination, whether it was encountered in the workplace or in obtaining housing. Congress intended to allow the operation of both statutes to the fullest extent possible, in order to fully eliminate discrimination.¹⁹² Limiting the scope of any exemptions to either statute achieves this goal by restricting the number of groups that may claim exemption from the statutes' mandates.¹⁹³ Requiring

186. 915 F.2d 877 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991).

187. See *supra* notes 153-75 and accompanying text.

188. See *supra* notes 181-85 and accompanying text.

189. For the text of the Title VII religious organization exemption, see *supra* note 147. The court in *EEOC v. Townley Eng'g & Mfg.*, 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989), noted that the general consensus after the congressional debate on the original Title VII exemption was that organizations that were "merely affiliated with a religious organization" were *not* exempt. *Id.* at 617 (emphasis added). The court noted that one Congressman had suggested that the exemption should be limited to "wholly church-supported organization[s]." *Id.* (emphasis omitted) (citing *EEOC Legislative History of Titles VII and XI of the Civil Rights Act of 1964* at 3204 (1968)). The *Townley* court noted that this suggestion was rejected in Congress, however, as being too narrow. *Townley*, 859 F.2d. at 617.

190. 42 U.S.C. § 2000e-1 (1988). See *supra* note 147 for the text of the exemption.

191. 42 U.S.C. § 3607 (1988). See *supra* note 57 for the text of the exemption.

192. See *supra* note 108.

193. The Club contended that courts have interpreted statutes designed to protect religious freedoms broadly, and, therefore, since the Fair Housing Act's exemption is designed to protect such freedoms, it should be interpreted broadly. See Brief for the Ap-

some sort of formal tie between the organization seeking the exemption and a church is one way of limiting the scope of the Fair Housing Act's exemption.

Therefore, if limiting the Fair Housing Act exemption's scope is a desirable end, then requiring a mutual relationship between an organization seeking the exemption and a religious organization is appropriate.¹⁹⁴ However, courts addressing the same issue in the future could benefit from a more precise set of factors to aid in this examination. Those factors can be found in the case law interpreting the Title VII exemption and the state housing law exemptions.

The same type of test that was set out in *Amos*,¹⁹⁵ *EEOC v. Townley Engineering & Manufacturing Co.*,¹⁹⁶ *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*,¹⁹⁷ or *Cowen v. Lily Dale Assembly*¹⁹⁸ could be applied to an entity seeking to benefit from the religious organization exemption contained in the Fair Housing Act. The *Amos* district court's test, like the *Townley* and *Scharon* tests, required close ties between the organization seeking the exemption and the religious organization.¹⁹⁹

The application of the *Amos* test to the facts of *Columbus Country Club* would support the majority's holding that a mutual relationship between the Church and the Club was absent on the facts of the case. For example, the first prong of the *Amos* district court's test required that there be a close and substantial relationship between the church and the organization seeking the exemption in the areas of day-to-day administration of the organization seeking the exemption or its

pellee, *Columbus Country Club*, at 16-17, *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990) (No. 90-1196), *cert. denied*, 111 S. Ct. 2797 (1991). However, the Fair Housing Act as a whole was not designed to protect religious freedoms, but to eliminate discrimination in housing. The Act's purpose is remedial. *See supra* note 108.

194. *See supra* text accompanying note 110.

195. 594 F. Supp. 791 (D. Utah 1984), *vacated*, 618 F. Supp. 1013 (D. Utah 1985), *rev'd*, 483 U.S. 327 (1987). *See supra* note 156 and accompanying text.

196. 859 F.2d 610 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). *See supra* note 163 and accompanying text.

197. 929 F.2d 360 (8th Cir. 1991). *See supra* note 175 and accompanying text.

198. 354 N.Y.S.2d 269 (App. Div. 1974). *See supra* note 184 and accompanying text.

199. The original *Amos* test only exempted the organization's religious activities. *See supra* note 156. However, the Supreme Court decision in *Amos* held, contrary to the district court's decision, that *all* activities of a qualified organization were exempt from Title VII's requirements. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). *See supra* note 151. The Supreme Court's decision did not, however, expressly invalidate the essential portion of the lower court's test, which is addressed in the text accompanying this footnote.

financial management.²⁰⁰ As applied to the facts of *Columbus Country Club*, there was no close tie between the Club and the Catholic Church in areas of financial and day-to-day management of the Club. The Club confirmed that its board of governors, and not the Church, controlled "maintenance, safety, youth, entertainment, grounds, chapel and clubhouse."²⁰¹ While the Club donated its weekly collection to the local parish, this donation in itself was not evidence of the Church's control of any aspect of the Club's financial management.

The second prong of the *Amos* test required that there be a close relationship between the church's tenets and the organization's activities.²⁰² If this test is applied to *Columbus Country Club*, the facts of the case show that Club members' activities, while residing in the bungalows during the summer months, included regular worship, but also included many other secular, vacation-related pursuits. A court might engage in a fact-finding determination of just how much time members actually spent in worship to determine what the relationship was between the Church's religious tenets and the Club's activities. However, if in fact secular activities predominated, the Club would fail to satisfy the second prong, and therefore, under both parts of the *Amos* test, the Club would not qualify for the exemption.²⁰³

The *Townley* and *Scharon* courts used different tests from that used by the *Amos* court.²⁰⁴ However, both the *Townley* and *Scharon* courts required that an organization have "extremely close ties" with an organized religion, or some indicia of control by the church over the organization seeking the exemption, in order for the non-church organization to be exempt from Title VII's requirements.²⁰⁵ The *Townley* court found that, since (1) the company seeking exemption did not mention a religious purpose in its articles of incorporation, (2) the company was not formally affiliated with or supported by a

200. See *supra* note 156.

201. Brief for the Appellee, *Columbus Country Club* at 6, *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990) (No. 90-1196), *cert. denied*, 111 S. Ct. 2797 (1991).

202. See *supra* note 156. The Supreme Court's decision in *Amos* required that a court consider all of the organization's activities, not just its "religious" activities. *Amos*, 483 U.S. at 339. See *supra* note 151.

203. The third prong of the *Amos* test specifically applied to employment situations and therefore might not prove useful in a housing situation. See *supra* note 156.

204. See *supra* notes 166-75 and accompanying text.

205. *EEOC v. Townley Eng'g & Mfg.*, 859 F.2d 610, 618 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991). The *Scharon* court held that Title VII could not be constitutionally applied to the hospitals, but it did not address the religious organization exemption. *Id.* See *supra* note 171.

church, and (3) the company was organized primarily for profit, its ties were not close enough to the church to qualify as a "religious" corporation, notwithstanding its owners' intention that the corporation be a "faith-operated business."²⁰⁶

In applying the *Townley* court's criteria, the Club would satisfy the first prong of the test, and would possibly satisfy the third prong as well, because its post-1987 bylaws did mention its religious purpose and because it is a nonprofit organization.²⁰⁷ However, the Club would not satisfy the second prong of the *Townley* test, because it was not formally affiliated with or supported financially by the Catholic Church²⁰⁸ or any Catholic "umbrella organization."²⁰⁹ Therefore, the *Townley* analysis leaves room for argument, and the Club might or might not have had ties with the church substantial enough to have qualified for the exemption.

The result under the *Scharon* test, on the other hand, would be clear-cut: the Club would not qualify for the exemption. The *Scharon* court would examine whether or not the Club's board of directors contained members appointed by the Church, and whether the Church required, or had the power to require, prior approval of any changes to the Club's articles of incorporation.²¹⁰ A court applying the *Scharon* test would examine these "formal" factors to determine whether the organization seeking the exemption was "church-affiliated[,] . . . with 'substantial religious character.'"²¹¹ The social character of the Club

206. *Townley*, 859 F.2d at 612, 619.

207. *United States v. Columbus Country Club*, 915 F.2d 877, 880 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991). However, the bylaws only referred to the Club's religious purpose after 1987. Prior to that, its statement of purpose characterized it as a social group, although its official history characterized it as both a vacation group and a Catholic organization. *Id.* at 879.

In addition, a court might analyze the Club's characterization of itself as a social group as comparable to a company organized primarily for profit, notwithstanding the religious views or intent of its founders or members. A social organization may be comparable to a for-profit organization because in both cases, the entity is organized primarily for its own benefit or for that of its owners or members, instead of for the benefit of others. If a court used this analogy, the Club would not satisfy the third prong of the *Townley* test.

208. *Columbus Country Club*, 915 F.2d at 879.

209. *United States' Opposition to Defendant's Petition for Rehearing En Banc* at 7, *Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990) (No. 90-1196), *cert. denied*, 111 S. Ct. 2797 (1991). The Club's formal relationship with the Knights of Columbus terminated in 1922. *See supra* note 76. The United States' Opposition also noted that the Club's formation was not required by the Church, and the Club was not required, either by the Church or by the tenets of Catholicism, to limit its members to Catholics. *United States' Opposition to Defendant's Petition for Rehearing En Banc* at 7.

210. *See supra* note 175 and accompanying text.

211. *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991). *See supra* note 175.

as a whole, and the lack of any formal affiliation with the Church, would be the determinative factors in a court's decision that it was not entitled to the exemption under the *Scharon* test.

The Club would fail to meet the test set out in *Lily Dale* for the same reasons that the Club would not qualify for the exemption under the *Scharon* test. The *Lily Dale* court relied almost entirely upon the Assembly's formal affiliation with a religious organization in finding that the Assembly qualified under the New York housing law's religious organization exemption.²¹²

If a court were to apply any of the Title VII tests to the Fair Housing Act's exemption, it might conceivably encounter some problems. The language of the two exemptions is not identical. The Title VII exemption applies only to religious corporations, associations, educational institutions, or societies.²¹³ The Fair Housing Act exempts not only religious organizations, associations, or societies, but also exempts nonprofit institutions or organizations that are operated, supervised, or controlled by or in conjunction with religious organizations, associations, or societies.²¹⁴ An application of the Title VII standards to the Fair Housing Act's exemption might be criticized because the language contained in the Act's exemption is arguably broader than that in Title VII's exemption. The dissimilarity of the exemptions' language in this respect could present a problem because Congress may have intended the Fair Housing Act's exemption to embrace a broader group of organizations than the Title VII exemption encompasses. This interpretation of Congress' intent could be supported by noting that the Fair Housing Act was passed into law in 1968, well after Title VII's enactment in 1964.²¹⁵ During those years, Congress might have changed its mind about the proper scope of a religious organization exemption and may have decided to broaden the scope of the Fair Housing Act's exemption. However, the Fair Housing Act's legislative history does not support this argument.²¹⁶ Moreover, the initial version of the Fair Housing Act's exemption was drafted in 1966, only two years later than the enactment of Title VII.²¹⁷ Therefore, it is equally conceivable that Congress intended courts to interpret the two exemptions similarly.

212. *Cowen v. Lily Dale Assembly*, 354 N.Y.S.2d 269, 271 (App. Div. 1974). See *supra* notes 181-82 and accompanying text.

213. 42 U.S.C. § 2000e-1 (1988).

214. 42 U.S.C. § 3607 (1988).

215. See *supra* notes 1, 141.

216. See *supra* notes 43-60 and accompanying text.

217. See *supra* note 50 and accompanying text.

Furthermore, the Title VII case law supports the proposition that the additional language in the Fair Housing Act's exemption must be interpreted as stating explicitly what was implied in the Title VII exemption—that a formal relationship is required between an entity seeking to benefit from the exemption and a church. Thus, the additional language in the Fair Housing Act's exemption would not broaden the class of organizations that can benefit from the Act's exemption beyond the scope of those that can benefit from Title VII's exemption. The additional language in the Fair Housing Act's exemption just serves to make Congress' intent clearer.

Another pertinent concern in deciding whether to apply standards developed in Title VII exemption case law to the interpretation of the Fair Housing Act's exemption is the different nature of the activities prohibited under the two statutes. Unlike Title VII, the Fair Housing Act is not concerned with an organization's discriminatory treatment of its employees, but with its discriminatory sale or rental of housing. The two statutes arguably serve completely different purposes. Congress therefore might have intended that they be interpreted differently, notwithstanding the similarity of the exemptions' language.

However, in *Amos*,²¹⁸ the Supreme Court implied that it is the character of the organization, and not its activities, that must be examined in determining whether or not the organization falls within the Title VII exemption.²¹⁹ This rule would apply equally well to a decision to make a comparison between the standards governing the application of the Title VII exemption and the Fair Housing Act's exemption. If a court should concern itself only with the character of the organization, and not its activities, then whether the organization is discriminating in employment or in housing would seem to be irrelevant.

All of the cases interpreting the scope of the Title VII exemption, as well as the state case law interpreting the scope of religious organization exemptions to state fair housing statutes,²²⁰ whether dealing with organizations wholly owned by a church, or with independently owned organizations, have required some sort of formal connection between the organization seeking to benefit from the exemption and a

218. 483 U.S. 327 (1987).

219. *Id.* at 336. The Court reasoned that if a religious organization were required, "on pain of substantial liability, to predict which of its activities a secular court will consider religious," the organization would be so burdened with a fear of potential liability that it might change the way it carried out "what it understood to be its religious mission." *Id.*

220. See *supra* notes 181-85 and accompanying text.

religious organization. These cases have all examined the following factors: the presence or absence of a formal affiliation with a religious organization; the contents of the organization's bylaws, including any statements of religious purpose contained therein, whether a church must approve any changes thereto, and whether the organization's bylaws required that religious leaders sit on the board of directors; and the existence of any specific policies which forbid deviation from the doctrines or tenets of the religion with which the organization is associated.

If a court applied all of these elements to the facts of *Columbus Country Club*, the Fair Housing Act exemption still would not have applied to the Club. The Club was not "formally" affiliated with the Church because it was not owned by the Church or operated pursuant to a charter or any other legally binding agreement. The Club's bylaws, as amended in 1987, did contain a statement of religious purpose,²²¹ thus satisfying one of the elements of the combined tests. However, no evidence was presented as to whether the Church had the authority to approve or disapprove of any changes in the Club's bylaws, and the bylaws did not require that any leaders of the Church be on the Club's board of directors. Only one of the factors was satisfied: the Club's bylaws included a statement of the Club's religious purpose. This is similar to the factor that the *Townley* court found irrelevant to its decision that the entity at issue was not entitled to the Title VII exemption.²²²

B. *Constitutional Considerations*

The Supreme Court held in *Amos*²²³ that the 1972 amendment to Title VII's religious organization exemption did not violate the First Amendment's Establishment Clause.²²⁴ The majority opinion in *Columbus Country Club* did not address any constitutional issues.²²⁵ The dissenting judge in *Columbus Country Club* thought that the majority's interpretation of the Fair Housing Act's exemption might interfere with the First Amendment's Free Exercise Clause, although

221. See *supra* note 86.

222. See *supra* note 163 and accompanying text. If a statement of religious purpose were enough, any organization could qualify for the exemption simply by including such a statement in its bylaws.

223. 483 U.S. 327 (1987).

224. *Id.* at 336-39. See *supra* note 151 and accompanying text.

225. *United States v. Columbus Country Club*, 915 F.2d 877, 885 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991).

her analysis of the potential problem was somewhat sketchy.²²⁶ The Club argued in its Petition for Writ of Certiorari to the United States Supreme Court that the majority's interpretation and application of the Fair Housing Act's provisions to it was unconstitutional because it violated the Establishment Clause and the Club's members' rights under the Free Exercise Clause.²²⁷ The Supreme Court declined the Club's petition.²²⁸

On remand to the district court, the government filed a motion for partial summary judgment, requesting that the court determine that the exemption was not unconstitutional as applied to the Club.²²⁹ The court noted that the Club "presumably [could] make dwellings available on a non-discriminatory basis, in full compliance with the statute, without necessarily experiencing significant intrusions into the religious beliefs and practices of its Catholic members."²³⁰ The court found that, since the Club did not contend that any religious activities occurred anywhere other than the chapel or the shrine, the Club members' religious observances would not be affected by allowing non-Catholics to obtain the leasehold rights to the summer bungalows.²³¹ The district court held that the Club members' associational rights were thus not affected by compliance with the Fair Housing Act, relying principally upon the Third Circuit's decision in *Salvation Army v. New Jersey Department of Community Affairs*²³² and the Supreme Court's decision in *Employment Division, Oregon Department of Human Resources v. Smith*.²³³

In *Salvation Army*, the Salvation Army ("SA") challenged a state

226. See *supra* note 136.

227. Petition for Writ of Certiorari, at 11-17, *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990) (No. 90-1196), *cert. denied*, 111 S. Ct. 2797 (1991). The Club had also made its constitutional arguments before the Third Circuit. That court declined to address these arguments since the district court had not done so. *Columbus Country Club*, 915 F.2d at 885. See *supra* note 15.

228. *United States v. Columbus Country Club*, 111 S. Ct. 2797 (1991).

229. *United States v. Columbus Country Club*, No. 87-8164, 1992 U.S. Dist. LEXIS 11606, at *2 (E.D. Pa. July 30, 1992).

In the meantime, the Club's attorney successfully petitioned for the court's leave to withdraw from the case. *Id.* at *3. The Club did not retain new counsel, but instead submitted a letter to the judge along with a book regarding the Club's history. *Id.* at *3-4. The court decided the issues before it without the benefit of a brief from the Club. *Id.* at *4.

230. *Id.* at *6.

231. *Id.*

232. 919 F.2d 183 (3d Cir. 1990).

233. 494 U.S. 872 (1990). See *infra* notes 265-66 and accompanying text for a further discussion of *Smith*.

statute regulating boarding houses on free exercise grounds.²³⁴ SA operated an Adult Rehabilitation Center, which, among other things, housed and fed approximately fifty homeless men.²³⁵ SA failed to comply with many provisions of the statute. The statute apparently did not contain a religious organization exemption, but state officials had informally granted SA an exemption from some of its requirements.²³⁶ However, SA argued that the statute still applied to it, since the informal exemption was not legally binding.²³⁷ SA contended that the statute interfered with SA's and its members' free exercise rights by "impermissibly intruding upon the practice of its religion."²³⁸ SA also asserted that the statute violated SA's and its members' associational rights and their First Amendment rights in general.²³⁹ Based upon the Supreme Court's decision in *Smith*,²⁴⁰ the *Salvation Army* court held that SA's free exercise challenge could not succeed.²⁴¹

The district court in *Columbus Country Club* found the Club's situation analogous to that of the appellant in *Salvation Army*, and stated that "the religious motivation of those who associate for religious purposes does not entitle them to an exemption from a generally applicable statute."²⁴² However, the district court did not specifically state why *Salvation Army* or *Smith* required its holding. Moreover, the district court did not address the Club's argument under the Establishment Clause. The same issues may be presented again in the next case dealing with the scope of the Fair Housing Act's religious organization exemption. It therefore is useful to analyze the constitutional issues in a little more depth than did the district court in *Columbus Country Club*.

234. *Salvation Army*, 919 F.2d at 183. The New Jersey Rooming and Boarding House Act of 1979 required that all rooming and boarding houses be licensed, and regulated "virtually every aspect" of their conduct. *Id.* at 186.

235. *Id.* at 189.

236. *Id.* at 185.

237. *Id.*

238. *Id.*

239. *Id.* SA declined to state which portions of the statute it objected to. It simply continued to maintain that complying with most of the regulations promulgated under the statute would interfere with the free exercise of its religion. *Id.* at 190-91.

240. 494 U.S. 872 (1990). The *Salvation Army* court noted that the *Smith* decision was released while the *Salvation Army* appeal was pending. *Salvation Army*, 919 F.2d at 185. See *infra* notes 265-66 for a discussion of *Smith*.

241. *Salvation Army*, 919 F.2d at 185.

242. *United States v. Columbus Country Club*, No. 87-8164, 1992 U.S. Dist. LEXIS 11606, at *7-8 (E.D. Pa. July 30, 1992) (citing *Salvation Army*, 919 F.2d at 199).

1. Does the *Columbus Country Club*²⁴³ Majority's Interpretation of the Fair Housing Act's Religious Organization Exemption Violate the Establishment Clause?

The three-pronged test set out in *Lemon v. Kurtzman*²⁴⁴ negates the Club's argument that a narrow interpretation of the exemption violates the Establishment Clause. Under the first prong, the law must first serve a "secular legislative purpose."²⁴⁵ If Congress' aim in passing a particular statute is to avoid governmental interference with religious organizations' abilities to carry out their religious missions, the first part of the *Lemon* test is satisfied.²⁴⁶ This was Congress' intent in enacting the original Title VII exemption, the amendment to the Title VII exemption,²⁴⁷ and the Fair Housing Act's exemption.²⁴⁸

The second prong of the *Lemon* test is satisfied if the law at issue has a principal effect that neither advances nor inhibits religion.²⁴⁹ This prong is satisfied unless the government itself has advanced religion by means of the statute.²⁵⁰ Under the *Lemon* test, "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. The 'establishment' of religion connote[s] sponsorship, financial support, and active involvement of the sovereign in religious activity."²⁵¹ Under this test, the *Amos* Court held that the amended Title VII exemption did not advance religion, but simply allowed religious organizations to proceed with their employment decisions without interference from the government.²⁵² The Fair Housing Act's exemption cannot be said to advance religion any more than the Title VII exemption does, especially if the *Columbus Country Club* majority's narrow interpretation of the exemption is correct.

The third prong of the *Lemon* test requires that the statute not impermissibly entangle church and state.²⁵³ The *Amos* Court found

243. 915 F.2d 877 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991).

244. 403 U.S. 602 (1971). *See supra* note 151. The Supreme Court reaffirmed the *Lemon* test in *Lee v. Weisman*, 112 S. Ct. 2649 (1992), although in *Weisman*, the Court held that the inclusion of a prayer or benediction at a public school graduation ceremony could be declared unconstitutional without reference to the *Lemon* test. *Id.* at 2655.

245. *Lemon*, 403 U.S. at 612.

246. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987).

247. *Id.*

248. *See supra* note 7 and accompanying text.

249. *Lemon*, 403 U.S. at 612.

250. *Amos*, 483 U.S. at 337.

251. *Id.*

252. *Id.*

253. *Lemon*, 403 U.S. at 613.

that the 1972 amendment to the Title VII exemption, which had foreclosed any inquiry into whether an employee was employed in a "religious" aspect of an employer's activities, did just the opposite of impermissibly entangling church and state, by "effectuat[ing] a more complete separation of the two."²⁵⁴ Thus, the post-1972 Title VII exemption satisfied all three prongs of the *Lemon* test.

Requiring a narrow interpretation of the Fair Housing Act's exemption would seem to follow the *Amos* Court's reasoning and satisfy the *Lemon* test. If a court were required to decide whether a given entity is entitled to benefit from the exemption on any basis other than an inquiry into whether the entity has a formalized mutual relationship with a church, the court would have to look to other factors. Any other test might require the court to decide on the basis of how strong the organization's members' religious beliefs are. Any test based upon a court's examination of members' religious beliefs is potentially unconstitutional under the third prong of the *Lemon* test.²⁵⁵

2. Does the *Columbus Country Club*²⁵⁶ Majority's Interpretation of the Fair Housing Act's Religious Organization Exemption Violate the Free Exercise Clause?

The majority opinion in *Columbus Country Club*²⁵⁷ forecloses the Club from denying its permission for the sale or transfer of summer bungalows to persons who are not Catholic. The majority held that the exemption did not apply to the Club because the Club had no formal ties to the Catholic Church. The Club argued that this decision interferes with Club members' desire to spend the summer in an exclusively Catholic community.²⁵⁸ Furthermore, if the Club were forced to admit a significant number of non-Catholics, the Club's entire character might change. For example, if the non-Catholic members emerged as the majority group, they could conceivably turn the Club into an entity that did not sponsor any religious activities. The district court found that neither of these two arguments represented a strong enough infringement on Club members' free exercise rights to warrant

254. *Amos*, 483 U.S. at 339.

255. *See id.*

256. 915 F.2d 877 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991).

257. *Id.*

258. *See* Petition for Writ of Certiorari at 14-16, *United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990) (No. 90-1196), *cert. denied*, 111 S. Ct. 2797 (1991).

finding the Act, as applied to the Club, unconstitutional.²⁵⁹

The Free Exercise Clause would grant the Club members protection against the occurrence of either of these scenarios only if the members could show that an exemption from the Act's provision was constitutionally required.²⁶⁰ Even if an exemption for members of a religious group is desirable or permissible under the Constitution, if such an exemption is not constitutionally required, then the decision regarding whether or not to accommodate such groups under the Free Exercise Clause should be left to the legislature.²⁶¹

In order for a group to show that the Constitution requires an exemption on free exercise grounds from an otherwise generally applicable law, it first must show that its members' free exercise rights have been significantly interfered with. " 'Not all burdens on religion are unconstitutional The state may justify a limitation on religious liberty by showing that [the limitation] is essential to accomplish an overriding governmental interest.' " ²⁶² Furthermore, acts by the government that "have no tendency to coerce individuals into acting contrary to their religious beliefs" do not result in constitutionally cognizable burdens on free exercise interests.²⁶³ If the plaintiffs cannot meet the threshold requirement of showing a constitutionally cognizable burden which tends to coerce them into acting contrary to their religious beliefs, the government need not justify its actions by showing that its interest in regulating the conduct at issue is "compelling."²⁶⁴

In *Smith*,²⁶⁵ the Supreme Court held that the following "civic obligations" did not constitute burdens upon free exercise rights which require the government to demonstrate that its interest is "compelling": compulsory military service, payment of taxes, compliance with

259. *United States v. Columbus Country Club*, No. 87-8164, 1992 U.S. Dist. LEXIS 11606, at *7 (E.D. Pa. July 30, 1992).

260. *See Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 888, 890 (1990).

261. *Id.*

262. *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983) (denying tax-exempt status to religious university which discriminated on the basis of race) (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982)). The *Bob Jones* Court was applying the balancing test set out in *Sherbert v. Verner*, 374 U.S. 398 (1963). *Bob Jones Univ.*, 461 U.S. at 603-04. *See supra* note 39 and accompanying text for a discussion of this test.

263. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988) (involving challenge by Native Americans to U.S. Forest Service's construction of a road adjacent to holy places in a federally owned forest).

264. *Id.* *See also* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

265. *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990).

compulsory vaccination laws, drug laws, traffic laws, social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.²⁶⁶ The Supreme Court has thus included compliance with laws proscribing discrimination within the category of noncognizable burdens on free exercise rights. Therefore, it is practically certain that any court addressing a free exercise challenge to the Fair Housing Act's application to an entity such as the Columbus Country Club in the future would not require the government to show that its interest in achieving compliance with the Act was "compelling."

Thus, in a situation like the one presented by *Columbus Country Club*, the group seeking an exemption from the Act on free exercise grounds would first have to show a judicially cognizable burden on its free exercise interests. It would have to show that the Fair Housing Act, as applied to it, resulted in a tendency to coerce its members into acting contrary to their religious beliefs. Requiring a group such as the Columbus Country Club to allow non-Catholic members to own summer bungalows might harm the unity of the group. The group would have to prove that this harm to its structural unity as an exclusively Catholic group tends to coerce its members into acting contrary to their religious beliefs. This would be a difficult, if not impossible, argument to sustain, and the *Columbus Country Club* court on remand correctly rejected it.²⁶⁷ Even if the Club is required to allow non-Catholic members to purchase summer bungalows, the Catholic members would presumably still be able to practice their daily and weekly religious observances free of hindrance from the non-Catholic members unless those members eventually became the dominant group and decided to do away with such observances. Residing in a summer cottage among people of other faiths would not necessarily coerce the Catholic members of the Club into abandoning or acting contrary to their religious beliefs.²⁶⁸

Furthermore, the Club's free exercise argument ignored the fact that, under the Third Circuit's decision in *Columbus Country Club*, the Club would be exempt from the Fair Housing Act if it did in fact have formal ties with the Catholic Church. The Club need only enter

266. *Id.* at 889 (citations omitted).

267. *United States v. Columbus Country Club*, No. 87-8164, 1992 U.S. Dist. LEXIS 11606 (E.D. Pa. July 30, 1992).

268. *Id.* See *supra* note 138.

into some type of formal agreement with the Church in order to be able to limit ownership of the bungalows to Catholics.

Any future case turning upon the theory that the Fair Housing Act's exemption should be broadly interpreted due to the type of Free Exercise or Establishment Clause arguments presented by the Club will likely fail for the reasons outlined above. The majority's interpretation of the Act's religious exemption should withstand constitutional challenges.

CONCLUSION

The majority in *Columbus Country Club* reached the correct result. The decision would perhaps be on a sounder footing if the majority had engaged in a more extensive analysis, looking to cases interpreting the scope of the religious organization exemption contained in other statutes, such as Title VII and state fair housing laws. The tests articulated in the district court's decision in *Amos*,²⁶⁹ *EEOC v. Townley Engineering & Manufacturing Co.*²⁷⁰ or *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*²⁷¹ would help courts addressing the problem of determining whether an organization is, in fact, operated in conjunction with a religious organization.

An examination of all of the factors derived by combining the tests set out in *Townley*, *Scharon*, and *Amos* presents the most comprehensive checklist of all. These factors are: whether or not the entity seeking the exemption is formally affiliated with a church; whether or not the entity's bylaws or articles of incorporation contain any statements of religious purpose, require approval by the church of any changes in the bylaws or articles of incorporation, or require that church appointees sit on the board of directors or other governing body; whether or not the entity is forbidden from deviating from any tenet of the members' religion; whether or not, on those grounds, the entity has reserved the right to discriminate in employment on the basis of religion; and whether or not it has succeeded in asserting such a right, if that assertion has been challenged.

Without such an analysis, courts interpreting the scope of the Fair Housing Act's religious organization exemption in the future will be left without a comprehensive set of guidelines with which to make

269. 594 F. Supp. 791 (D. Utah 1984). See *supra* notes 200-03 and accompanying text for an application of the *Amos* test to the facts of *Columbus Country Club*.

270. 859 F.2d 610 (9th Cir. 1988). See *supra* notes 207-09 and accompanying text for an application of the *Townley* test to the facts of *Columbus Country Club*.

271. 929 F.2d 360 (8th Cir. 1991). See *supra* notes 210-11 and accompanying text for an application of the *Scharon* test to the facts of *Columbus Country Club*.

their determination. It is clear from all of the relevant case law that an organization may not benefit from a religious organization exemption simply by calling itself religious. A determination of whether or not any entity is controlled by, supervised by, or operated in conjunction with a religious organization must necessarily rest upon some or all of the above factors.

Claudia J. Reed